

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WISCONSIN  
GREEN BAY DIVISION

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EQUAL EMPLOYMENT OPPORTUNITY	)	
COMMISSION,	)	
	)	
Plaintiff,	)	Case No. CV 17-70
	)	Green Bay, Wisconsin
vs.	)	
	)	July 15, 2021
WAL-MART STORES EAST LP,	)	8:39 a.m.
	)	
Defendant.	)	<b>DAY 4</b>

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**TRANSCRIPT OF JURY TRIAL**  
BEFORE THE HONORABLE WILLIAM C. GRIESBACH  
UNITED STATES SENIOR DISTRICT JUDGE

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transcript produced by computer aided transcription.



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P R O C E E D I N G S

(Call to Order of the Court at 8:39 a.m.)

THE COURT: Okay, go ahead, be seated.

THE CLERK: The Court calls Case No. 17-CV-70, *EEOC vs. Wal-Mart Stores East, LP* for continuation of the jury trial.

THE COURT: Okay. And the record should reflect we are outside the presence of the jury, and counsel are here as they have been throughout the trial, same counsel.

JURY INSTRUCTION CONFERENCE

THE COURT: We sent out -- the record should reflect, of course, we had a lengthy informal jury instruction conference and verdict conference last night. Counsel indicated their objections to the proposed instructions and verdict form and made recommendations. Those were taken under advisement. And then late last -- well, not that late last night -- I sent out a draft of each. And then we made some -- I made some further revisions later, or earlier in the morning.

And those were -- we sent out a compared -- so you could just see the changes we made. And then the verdict form. And I think there was -- in the verdict there might have been one question that was mislabeled or the directions, and other than that you have the final form there. So that's what I would like to make a record on.

First with respect to EEOC, any objections to the instructions that I propose to give?

1 MR. MULAIRE: Just for the record, Your Honor, the  
2 EEOC respectfully objects to the instruction on the interactive  
3 process; whether or not an employee's need for an accommodation  
4 of her disability can be described as obvious.

08:41 5 We believe if the employer knows of the need it has an  
6 obligation to engage in the interactive process with the  
7 employee to explore accommodations, and that this is especially  
8 so for an employee whose communication skills and abilities her  
9 employer knows to be limited.

08:42 10 And then, with deep apologies, one thing that I didn't  
11 mention yesterday, it is minor, but the business judgment rule  
12 instruction that I know I, trying to be flexible, said, well, if  
13 the one from the pattern instruction is included that's fine.  
14 It does have "reasonableness" in the title and it says, you  
08:42 15 know, the reasonableness of defendant's actions aren't at issue.

16 But the pattern instruction is explicitly intended for  
17 Title VII in ADEA claims and disparate treatment claims, and we  
18 do have a reasonable accommodation claim in this case so I do  
19 worry about telling the jury that the defendant's reasonableness  
08:42 20 is not at issue.

21 So we would suggest to simply omit the word  
22 "reasonable" from the text. So it would say "You should not  
23 concern yourselves with whether Walmart's actions were wise or  
24 fair," rather than "wise, reasonable or fair."

08:43 25 And then for the heading -- I don't even know if the

1 jury gets the headings or those are just for our use, but I  
2 think it could just be called a cautionary instruction.

3 So my apologies for not noticing that last night. But  
4 that's the only other issue we had with the instructions, and we  
08:43 5 have no objection to the final version of the verdict form that  
6 was distributed.

7 THE COURT: I think that your comment on the  
8 cautionary instruction makes sense. This instruction is  
9 intended for Title VII cases.

08:43 10 MR. MULAIRE: Correct.

11 THE COURT: And where you add the reasonable  
12 accommodation feature of ADA it does not fit.

13 MR. MULAIRE: Correct.

14 THE COURT: So I think that's a reasonable and  
08:43 15 probably -- I mean, a lawful -- it would be improper for me to  
16 use reasonable to say you don't have to be reasonable here.

17 Any objection, Mr. Harlan?

18 MR. HARLAN: No objection.

19 THE COURT: In terms of the instruction on the  
08:44 20 interactive process. And we discussed this quite a bit  
21 yesterday. And I went over the cases again, and I think this is  
22 consistent with *Bultemeyer* at 100 F.3d 1281, and definitely with  
23 *Ekstrand* at 583 F.3d 972.

24 I think to begin the interactive process there has to  
08:44 25 be something more than just a disability. I know somebody asked

1 the question if the person asks -- with a wheelchair says I need  
2 a window, I want a window, does that mean you have to start an  
3 interactive process? Well, what's a wheelchair got to do with a  
4 window? I don't think that's the case. It sounds like he  
08:44 5 wanted a window. I think the answer to that wasn't what the  
6 attorney expected, but nevertheless it caught me.

7 But, and I think that's true here. There has to be  
8 some hint or some indication, or it has to be obvious. And I  
9 think there's an argument here that there's enough there. And  
08:45 10 you've made the argument to me, frankly, that after 15 years,  
11 knowing her limitations, this should have been apparent to  
12 anyone. And I think that's what the jury will decide.

13 But I think there has to be something more than just a  
14 request by a person with a disability. I think there has to be  
08:45 15 some indication that this request for a change is actually  
16 something I need because of my disability.

17 Or, you know, and here the sad thing is Marlo Spaeth  
18 did not have somebody acting more closely with her in the family  
19 and talking about that or making clear. Or, you know, the  
08:45 20 employer maybe should have known, but that's for the jury to  
21 decide. But the record's made on that.

22 MR. MULAIRE: Thank you.

23 THE COURT: Are there any additional instructions  
24 you're requesting then?

08:46 25 MR. MULAIRE: No, Your Honor.

1 THE COURT: How about the form of the verdict?

2 MR. MULAIRE: We have no objection to the final  
3 version that was distributed a little after 7:00 this morning.

4 THE COURT: Okay. And Mr. Harlan? I know you sent an  
08:46 5 email just recently -- or maybe it wasn't recent, I just got  
6 it -- saying that the verdict -- we don't ask a separate  
7 question on the discharge and we didn't include reasonable  
8 accommodation in the question about the termination and the  
9 reinstatement, but that's because it's in the jury instruction.

08:46 10 The jury instruction defines discrimination or defines  
11 a violation of the ADA to include the terminating because of  
12 disability or because of the reasonable -- the accommodation,  
13 the refusal to provide the accommodation. And I think because  
14 the jury instruction provides the explanation for what a  
08:46 15 violation is, there's no need to include it in the verdict form.

16 MR. BULIOX: So we would obviously object to that. We  
17 think that it should be included.

18 One of the things that we noticed in the form, the  
19 verdict form, is that the Court deleted the reference to  
08:47 20 "because of" or "on account of" --

21 (Defense counsel confer.)

22 MR. BULIOX: Yeah. So our concern is that it's  
23 obviously still in the instruction. You know, I think we argued  
24 extensively yesterday off the record about why this is an issue  
08:47 25 that needs to be out of the instruction.

1           Again, this is a failure to accommodate claim, but we  
2           also have a termination claim as well as a refusal to rehire or  
3           reinstate claim. And the failure to accommodate claim is  
4           separate from those two other claims.

08:48 5           The EEOC has not cited -- at least I haven't seen any  
6           cases from EEOC which suggests that in failure to accommodate  
7           claims the element -- I'm sorry, strike that. In failure to  
8           accommodate claims the element of a need to accommodate is also  
9           an element in termination and refusal to rehire claims.

08:48 10          Next, in our view and as we indicated on the record,  
11          this is essentially a backdoor effort to a retaliation claim  
12          which is not part of the EEOC's case. They had the opportunity  
13          to pursue a retaliation claim, they chose not to, and this is a  
14          way to get at that.

08:49 15          On top of that, at no point in the litigation did the  
16          EEOC place Walmart on notice that its termination and failure to  
17          hire claims were going to be based on some alternative theory;  
18          that these claims were because of or based on a need for an  
19          accommodation. In other words, what the EEOC has done has  
08:49 20          morphed the "because of disability" element into the termination  
21          and rehire claims and we don't think that's proper. And we're  
22          not aware of any caselaw to support that.

23          Additionally, if Walmart had notice of this potential  
24          I guess nuance theory, then it would have prepared for that. It  
08:50 25          would have presented witnesses and evidence about how the



1 company has accommodated other disabled individuals and how the  
2 Manitowoc store in particular has dealt with individuals with  
3 disabilities as well as Lee Spude and the other Walmart parties.  
4 So the lack of notice basically is in our view prejudicial and  
08:50 5 we just state that for the record.

6 In addition, the weighting instruction assumes that  
7 there was a need to accommodate -- the weighting instruction as  
8 written, it assumes there was a need to accommodate Ms. Spaeth  
9 in the first place. And there's only a need if it's known. And  
08:51 10 we would seek clarification on that for the jury's purpose so as  
11 to not confuse any issue.

12 And, again, this is basically a second and third shot  
13 at the EEOC's failure to accommodate case should they lose on  
14 the failure to accommodate because it's an element in each of  
08:51 15 the three claims. So they essentially have three failure to  
16 accommodate claims two of which are like hybrid claims. And we  
17 would object to that.

18 So on that particular issue, Judge, for the record,  
19 that is our objection.

08:51 20 THE COURT: Okay. Mr. Mulaire, did you want to  
21 comment at all? I was going to mention in terms of the basis,  
22 Mr. Mulaire cited the statute yesterday and that's what I looked  
23 at.

24 42 U.S.C. Section 12112 or 12112(b) talks about the --  
08:52 25 the general rule is that no entity shall discriminate against a

1 qualified individual on the basis of disability in regard to job  
2 application procedures, hiring, advancement, discharge,  
3 et cetera.

4 And then the construction says that "the term  
08:52 5 'discrimination against a qualified individual on the basis of  
6 disability' includes --" and one of the things it includes is  
7 "not making reasonable accommodations to the known physical or  
8 mental limitations of an otherwise qualified person."

9 And so they've alleged in their claim that there was a  
08:52 10 discriminatory discharge and a discriminatory refusal to rehire  
11 which is a reinstatement claim. And I think the statute clearly  
12 explains that discrimination in that context would include  
13 failing to provide a reasonable accommodation.

14 Now, in terms of -- I don't think the elements -- you  
08:53 15 know, if you read all the instructions, and I'm sure whoever is  
16 going to make your argument has focused in on the requirements  
17 for reasonable accommodation, I think are clear. In fact, EEOC  
18 disagrees with my instruction as to what gives rise to that  
19 reasonable accommodation, what their duty is, what the  
08:53 20 employer's duty is based upon the evidence that they have. But  
21 I certainly think it's clear from the instructions that the  
22 employer has to be aware of a need for an accommodation before  
23 there can be a failure to provide a reasonable accommodation.

24 It may not be in each and every element, I don't  
08:53 25 repeat it over and over, but it certainly is defined clearly in

1 these instructions.

2 So I think your concern is -- I understand your  
3 concern, but I think it's addressed in the instructions and I  
4 think argument will focus on those issues.

08:54 5 Anything else from Walmart as to either the form of  
6 the instructions, are there additional instructions you're  
7 asking that I make? I note I did remove the good faith  
8 exception. I looked at *Carter*, I have an argument here by EEOC.  
9 I know it's disputed that they would be -- that they were  
08:54 10 prejudiced by the failure to add the good faith defense as an  
11 affirmative defense. And I think that they've made a pretty  
12 good argument that they would have been prejudiced, they would  
13 have done discovery somewhat differently, asked additional  
14 questions. It's so late in the game that I think it's very  
08:54 15 difficult to say they would not be prejudiced. It seems to me  
16 that's a real problem here.

17 Certainly after the prior case it's surprising if  
18 Walmart was going to rely on a good faith they didn't move  
19 earlier to add that, but I think based on this procedural  
08:55 20 history I think the good faith is not here.

21 I also, as I said yesterday, think this is probably  
22 more of a technical argument. I think a jury if they are  
23 convinced that Walmart has done everything they can to try and  
24 avoid incurring liability, trying to comply with the ADA, I  
08:55 25 don't know if a jury is really going to find this as a case that

1 warrants punitive damages, but that will be up to the jury.

2 MR. BULIOX: Yeah, and for the record we respectfully  
3 disagree. We think that the EEOC had ample notice and  
4 opportunity to do discovery on and did, in fact, do discovery on  
08:55 5 the good faith defense. We do not believe that they have been  
6 prejudiced in any way. This issue has been litigated  
7 vigorously. And, you know, for the record we would, you know,  
8 again disagree with the Court's conclusion and go from there.

9 THE COURT: Mr. Mulaire, what you told me yesterday  
08:56 10 isn't on the record so if you want to make your argument about  
11 prejudice and why you think it would be unfair so that there's a  
12 basis there.

13 MR. MULAIRE: Sure.

14 We believe that there's prejudice because the caselaw  
08:56 15 typically looks at whether the parties have actually litigated  
16 the issue to try to detect an absence of prejudice. And in this  
17 case the good faith affirmative defense was not actually  
18 litigated at any stage of the litigation; not in summary  
19 judgment; it wasn't addressed at the trial that's now about to  
08:56 20 be concluded.

21 During discovery we could have done further discovery  
22 or would have undertaken discovery into not just the existence  
23 of policies, which we do know something about, but also  
24 Walmart's -- whether or not Walmart has actively enforced its  
08:57 25 policies against employment discrimination which the Seventh

1 Circuit has also said is an element of that defense.

2 THE COURT: So you would have looked at other  
3 instances in other stores and Walmart's history of utilizing  
4 this.

08:57 5 MR. MULAIRE: Correct.

6 And if I could just on an earlier topic just mention  
7 the statutory provision that I referenced yesterday. I won't  
8 retread the ground. But with respect to the definition of what  
9 it means to discriminate on a basis of disability, in  
08:57 10 Section 12112(b) (5) (B), the ADA defines discrimination on the  
11 basis of disability as including denying employment  
12 opportunities based on the need to make reasonable accommodation  
13 to the physical or mental limitations of the employee or  
14 applicant.

08:58 15 THE COURT: Okay. Anything else?

16 MR. BULIOX: Yeah, we have a few items just to state  
17 for the record. We understand the Court's position on them all.

18 But for Instruction 4.03, which is around the elements  
19 of a reasonable accommodation, we requested that the Court  
08:58 20 modify the model instruction to eliminate the verbiage around  
21 knowledge of a disability and to expand on that to include  
22 knowledge of a known limitation relating to a disability.

23 And the statute we cited for that was 42 U.S.C. 12112  
24 (b) (5) (A) .

08:59 25 We also cited *Taylor-Navotny vs. Health Alliance*

1 *Medical Plans, Incorporated*, pin cite 772 F.3d 478, 497, Seventh  
2 Circuit 2014, for the proposition that Walmart's duty to  
3 accommodate does not trigger unless it knows about a specific  
4 limitation about a disability and not just the disability  
08:59 5 itself.

6 And because of all of this, you know, we requested  
7 that the Court edit I believe at the time what was numbers 2, 6,  
8 and 8 to reference no limitations related to Ms. Spaeth's  
9 disability as opposed to just her disability.

09:00 10 And if you want, Judge, I can go into our other items  
11 or we can do it one at a time.

12 THE COURT: I'm not sure I follow this one. I'm  
13 looking at 4.03, Elements of Plaintiff's Claim - Reasonable  
14 Accommodation. And Element 2 is "Walmart was aware that  
09:00 15 Ms. Spaeth needed an accommodation due to her disability, either  
16 because Ms. Spaeth requested one or otherwise."

17 MR. BULIOX: So our concern is "due to her disability"  
18 as opposed to "due to a specific limitation regarding her  
19 disability."

09:00 20 THE COURT: Okay. Well, I think if you say she needs  
21 an accommodation due to her disability, I think that's saying  
22 because the disability imposes a limitation that requires an  
23 accommodation. And I think, again, looking at the instructions  
24 as a whole, that's covered. So I understand your objection's  
09:01 25 noted. Let's move on to your next one then.

1 MR. BULIOX: All right. The next one is on 4.08,  
2 which is on the interactive process. You know, as we stated  
3 yesterday, we're not aware of any obligation under the ADA for  
4 an employer to engage in a back-and-forth interactive process  
09:01 5 with anyone relating to an employee.

6 So, you know, even if Walmart's policies may suggest  
7 otherwise, their policies go above and beyond what's required in  
8 the law and they're not the law.

9 Now, certainly, you know, anybody can reach out and  
09:02 10 request an accommodation, but in terms of engaging in an  
11 interactive process, you know, there's nothing that we're aware  
12 of that suggests that Walmart has an obligation to do that, with  
13 the doctor, or with a family member, or anybody else.

14 And, again, you know, the same argument about  
09:02 15 limitations to known disabilities would apply here. So, you  
16 know, we argue that it should not just be because of a  
17 disability, but because of known limitations related to a  
18 disability.

19 We cited a few cases for the proposition that when the  
09:02 20 medical need for an accommodation is not obvious, which is  
21 covered, you know, to a degree in the Court's most recent  
22 version of the instructions, but that when the need for medical  
23 accommodation or reasonable accommodation is not obvious the  
24 employer must be provided with corroborating evidence such as a  
09:03 25 doctor's note, or at least a statement from a doctor.

1 And we cited the *Ekstrand* case vs. *School District of*  
2 *Somerset*, 583 F.3d 792 [sic 972], as well as the cases that were  
3 cited in our trial brief, at I believe pages 3 and 4 of that  
4 brief. I won't go through all of those case cites unless the  
09:03 5 Court wants me to.

6 THE COURT: No, no. I think your trial brief is a  
7 matter of record, too. But I think that this instruction  
8 accurately -- along with the others -- accurately conveys the  
9 law. So any other objections?

09:03 10 MR. BULIOX: Yes. So we requested an instruction  
11 regarding attendance violations that are caused by disability,  
12 and we argued that an employee's violation of a workplace rule  
13 is not excused by the ADA even if it's caused by the employee's  
14 disability.

09:04 15 So in that case we cited *Guzman vs. Brown County*,  
16 884 F.3d 633, Seventh Circuit, 2018. So, again, that will be --

17 THE COURT: Yeah, the idea that there's never a need  
18 for a change of schedule as an accommodation flies in the face  
19 of the regulations that specifically mention -- in fact,  
09:05 20 Walmart's documents as well mention potentially changing the  
21 schedule as a reasonable accommodation. So, yes, you have to  
22 show up, but the question of what the schedule should be could  
23 be an accommodation. So I think I've accurately stated the law  
24 on that issue as well. Next?

09:05 25 MR. BULIOX: On the punitive damage issue on the



1 special verdict form, we've requested that there be a fact  
2 question on willful reckless disregard of the law.

3 THE COURT: I think the need for that element is in  
4 the instructions and I think you argued that punitives are not  
09:05 5 appropriate here even if you find liability because, as the  
6 instruction says, you need to find this recklessness or  
7 reprehensibility, the other elements aren't there. So I think  
8 it's simpler to have the jury instructed properly and let them  
9 answer the question with that instruction in mind.

09:06 10 MR. BURNETT: Your Honor, I think to complete our  
11 record on that subject we should propose a question, so if I can  
12 articulate that for the record. We would propose:

13 "If you have answered Questions 5 or 6 'Yes' then  
14 answer this question: Did Walmart act with malice or in  
09:06 15 reckless disregard of the rights of Marlo Spaeth under the  
16 Americans With Disabilities Act?"

17 And we to do that based on Rule 49 which indicates  
18 that the court can require a special verdict, but in doing so  
19 there should be a special written finding on each issue of fact.

09:06 20 I think the law is that there needs to be a factual  
21 basis on liability before a jury can award damages. I think the  
22 law is that the verdict should contain all the findings on  
23 essential but contested facts necessary to support a judgment.

24 And I think this particular format has the potential  
09:07 25 to mislead the jury into concluding that, if Walmart violated

1 the ADA, they may award punitive damages. All other questions  
2 in this verdict are preceded by liability questions, but this  
3 one would not be.

4 So that's the full basis of our objection.

09:07 5 THE COURT: What's the EEOC's position on that?

6 MR. MULAIRE: I mean, I think, as Your Honor said, the  
7 general format that's followed here is that the instructions  
8 provide the law and the guideline for jurors to follow and the  
9 verdict form just asks them for their conclusions. So we don't  
09:07 10 see the need for that question.

11 Rule 49 also doesn't require -- I mean, Rule 49  
12 doesn't require using a special verdict form at all; it just  
13 says that the court may require a jury to return only a special  
14 verdict in the form of a special written finding on each issue  
09:08 15 of fact. It doesn't require that every issue of fact be  
16 spelled --

17 I mean, there are hundreds of issues of fact in this  
18 case if you take that literally. I don't think that Rule 49 is  
19 saying that every factual question needs to be spelled out on  
09:08 20 the verdict form.

21 I mean, we would also oppose the particular question  
22 that they've asked to the extent that for some reason it's only  
23 tied to the disparate impact claims. Punitive damages is a way  
24 for any violation of Title I of the ADA, including the failure  
09:08 25 to accommodate. So even if there were such a question, it

1 shouldn't just be tied to questions about the termination and  
2 failure to reinstate. So we think the verdict form is fine as  
3 is.

4 THE COURT: Okay.

09:09 5 MR. BURNETT: Your Honor, in listening to  
6 Mr. Mulaire's point on the form of the verdict, I think he's  
7 right in the sense that the question should read -- and I was  
8 going to propose a different preamble:

9 "If you've answered Question 3, 5, or 6 'Yes,'" that  
09:09 10 covers all three claims.

11 THE COURT: And then what would the question be?

12 MR. BURNETT: Then the balance of the question that I  
13 read: "Then answer this question: Did Walmart act with malice  
14 or in reckless disregard of the rights of Marlo Spaeth under the  
09:09 15 Americans With Disabilities Act?"

16 MR. MULAIRE: May I comment, Your Honor?

17 THE COURT: Yes.

18 MR. MULAIRE: First of all, the Court does have  
19 instructions in front of Questions 7 and 8 that do say if you  
09:10 20 answered -- well, the second sentence says, "If you answered  
21 'No' to Questions 3, 5, and 6, then do not answer any more  
22 questions." So I think that makes it clear that they would not  
23 go on to 8.

24 And, I mean, as the existing instruction makes clear,  
09:10 25 just to be precise about it, I mean, it's that the jury has to

1 answer "Yes" to Question 3 and "No" to Question 4, or "Yes" to  
2 either Question 5 or 6. Then they go on to the damages  
3 questions.

4 But I think that's clear from the existing form. To  
09:11 5 the extent the defendant is asking for additional verbiage in  
6 front of Question 8 I think it's redundant.

7 Question 8 is also phrased as "What amount, if any, do  
8 you award as punitive damages?" The instructions make it clear  
9 that the jury is not required to award punitive damages, even if  
09:11 10 they find there's reckless disregard, and makes it clear what  
11 the standard for reckless disregard is.

12 So I don't think -- I just don't think anything  
13 further is needed on the verdict form.

14 THE COURT: Yeah, I agree. I'm going to leave it as  
09:11 15 it is. I think that the -- a question could be added, but I  
16 think we're even disputing what the question should be. I think  
17 the instruction is there to tell them what the circumstances are  
18 under which punitive damages may be awarded and the  
19 considerations in granting them. I mean, you could have  
09:12 20 separate questions as to each of the considerations, too. I  
21 just think it's -- this is an issue for argument and the jury  
22 will return a response.

23 Okay, anything further then?

24 MR. BULIOX: Yeah, I believe one more, Your Honor.

09:12 25 So yesterday in our conference we requested that our

1 proposed instruction regarding the mother and contacting the  
2 mother be included in the Court's jury instructions. And that  
3 proposed instruction was from our amended proposed instruction  
4 document we filed with the Court earlier, and it was Instruction  
09:12 5 No. 35, which basically provided that Walmart had no obligation  
6 under the law to contact Marlo Spaeth's mother or sister  
7 regarding any aspect of her employment including, but not  
8 limited to, her attendance, coachings, or terminations. And  
9 then we said, "However, you may consider this evidence for other  
09:13 10 purposes."

11 We're not aware of, again, any legal authority  
12 suggesting that Walmart had an obligation to affirmatively reach  
13 out to the mother or sister regarding aspects of Ms. Spaeth's  
14 employment. And I think the way the evidence came out and what  
09:13 15 EEOC will likely argue in closing is that they did have an  
16 obligation to reach out to the mom or to the sister, and we  
17 don't think that's an accurate -- we don't think that's  
18 consistent with the law.

19 MR. MULAIRE: We object to that proposed instruction.  
09:14 20 There's no legal authority provided for it in the defendant's  
21 submission.

22 The law that governs is the ADA and the reasonable  
23 accommodation obligation and the interactive process. Every  
24 aspect of it sounds in reasonableness. And so the legal  
09:14 25 obligation is that if under the circumstances of Ms. Spaeth's

1 employment and the way that the company has interacted with her  
2 the jury concludes that it would have been reasonable for the  
3 company to speak with her mother or her sister later on, then if  
4 it's reasonable and the company failed to do it then that is a  
09:14 5 problem under the ADA.

6 So we think that the instruction proposed is wrong  
7 under the law because, depending on the individualized factual  
8 circumstances of a particular case, it may be reasonable for a  
9 company to interact with some representative of the employee as  
09:14 10 is the case in this lawsuit.

11 THE COURT: I agree. Whether someone should interact  
12 with other members of the family is fact dependent upon the  
13 case. It might be reasonable, it's arguable. But certainly  
14 there's not a hard and fast rule that you must, there's not a  
09:15 15 hard and fast rule that you must not, or that you need not. It  
16 depends on the facts and so counsel can argue that to the jury.  
17 Okay. Is that it?

18 MR. BULIOX: I think so.

19 THE COURT: I think the record is made. We will make  
09:15 20 the change to the business judgment instruction, and other than  
21 that then we'll come right out and bring the jury.

22 MR. MULAIRE: Your Honor, I believe we were in the  
23 process of printing something that Ms. Vance is going to refer  
24 to in her -- just her own notes. I just want to make sure we  
09:15 25 had enough of a chance to print it.

1 Okay, thank you. We're set.

2 THE COURT: Okay.

3 (Recess taken at 9:15 a.m., until 9:19 a.m.)

4 THE COURT: Okay. We'll bring the jury in then.

09:19 5 Everybody ready?

6 MS. VANCE: Yes.

7 (Jury in at 9:20 a.m.)

8 THE COURT: Go ahead be seated everyone.

9 Okay, good morning, ladies and gentlemen.

09:21 10 JURORS IN UNISON: Good morning.

11 THE COURT: We're at that stage where what will happen  
12 now is first I will instruct you on the law. And I'll read  
13 these instructions to you, but you're going to get copies of the  
14 instructions so you can refer to them during your deliberations  
09:21 15 after you hear arguments. But this will give you the law so  
16 you'll understand the arguments of the attorneys.

17 I have also handed out copies of the verdict. And the  
18 verdict contains the questions that you'll be asked to answer in  
19 the course of your deliberations. And the attorneys will  
09:21 20 probably argue about what those answers should be, and I thought  
21 it might be helpful to have the questions in front of you so you  
22 can understand their arguments. Okay.

23 FINAL JURY INSTRUCTIONS

24 THE COURT: So. Members of the jury, you have seen  
09:22 25 and heard all the evidence and are about to hear the arguments

1 of the attorneys. Now I will instruct you on the law.

2 You have two duties as a jury. Your first duty is to  
3 decide the facts from the evidence in the case. This is your  
4 job, and yours alone. Your second duty is to apply the law that  
09:22 5 I give you to the facts. You must follow these instructions,  
6 even if you disagree with them. Each of the instructions is  
7 important, and you must follow all of them. Perform these  
8 duties fairly and impartially. Do not allow sympathy or  
9 prejudice to influence you. You should not be influenced by any  
09:22 10 person's race, color, religion, national ancestry, or sex.

11 Nothing I say now, and nothing I said or did during  
12 the trial, is meant to indicate any opinion on my part about  
13 what the facts are or about what your verdict should be.

14 In this case, the defendant is a corporation. All  
09:23 15 parties are equal before the law. A corporation is entitled to  
16 the same fair consideration that you would give any individual  
17 person.

18 The Equal Employment Opportunity Commission, or EEOC,  
19 is the plaintiff in this case. The EEOC is an agency of the  
09:23 20 United States Government that is responsible for enforcing the  
21 federal laws prohibiting employment discrimination, including  
22 the Americans With Disabilities Act, or what we call the ADA.  
23 When a person feels that his or her employer has discriminated  
24 against them, that person may file a charge of discrimination  
09:23 25 with the EEOC. The EEOC has the authority to file a lawsuit and



1 seek remedies against an employer on behalf of such person or  
2 the person may sue on his own behalf. The EEOC brings this  
3 lawsuit on behalf of Marlo Spaeth. The fact that the EEOC has  
4 brought this lawsuit is no cause for you to give more or less  
09:24 5 weight to the claims.

6 The evidence consists of the testimony of the  
7 witnesses, the exhibits admitted in evidence, and stipulations  
8 or agreements by the attorneys as to what facts may be.

9 A stipulation is an agreement between both sides that  
09:24 10 certain facts are true.

11 During this trial, certain testimony was presented to  
12 you by the reading of depositions. You should give this  
13 testimony same consideration you would give it had the witnesses  
14 appeared and testified here in court.

09:24 15 Certain things are not to be considered as evidence.  
16 I will list them for you:

17 First, if I told you to disregard any testimony or  
18 exhibits or struck any testimony or exhibits from the record,  
19 such testimony or exhibits are not evidence and must not be  
09:24 20 considered.

21 Second, anything you may have seen or heard outside  
22 the courtroom is not evidence and must be entirely disregarded.

23 Third, questions and objections or comments by the  
24 lawyers are not evidence. Lawyers have a duty to object when  
09:25 25 they believe a question is improper. You should not be

1 influenced by any objection, and you should not infer from my  
2 rulings that I have any view as to how you should decide the  
3 case.

4 Fourth, the lawyers' opening statements and closing  
09:25 5 arguments to you are not evidence. Their purpose is to discuss  
6 the issues and the evidence. If the evidence as you remember it  
7 differs from what the lawyers said, your memory is what counts.

8 Any notes you have taken during this trial are only  
9 aids to your memory. The notes are not evidence. If you have  
09:25 10 not taken notes, you should rely on your independent  
11 recollection of the evidence and not be unduly influenced by the  
12 notes of other jurors. Notes are not entitled to any greater  
13 weight than the recollections or impressions of each juror about  
14 the testimony.

09:26 15 In determining whether any fact has been proved, you  
16 should consider all the evidence bearing on the question  
17 regardless of who introduced it.

18 You will recall that during the course of this trial I  
19 instructed you that I admitted certain evidence for a limited  
09:26 20 purpose. You must consider this evidence only for the limited  
21 purpose for which it was admitted.

22 You have heard testimony by some witnesses, including  
23 Walmart employees, concerning what they believe the ADA required  
24 under the circumstances of this case. Such testimony is  
09:26 25 relevant to determine why they took certain actions and what

1 their state of mind might be. But the question of what the ADA  
2 requires is a legal question that the court will address in its  
3 instructions at the end of the case. In these instructions.  
4 And whether Walmart violated the ADA is ultimately a question  
09:27 5 for you to decide based on all the evidence in the case.

6 You have also heard testimony as to whether Walmart's  
7 actions complied with its own internal policies and training.  
8 You may consider this evidence in your deliberations. You  
9 should keep in mind, however, that Walmart's policies are not  
09:27 10 necessarily what the law requires. The issue ultimately is  
11 whether Walmart violated the ADA, not whether it violated its  
12 own internal policies or procedures.

13 You should use common sense in weighing the evidence  
14 and consider the evidence in light of your own observations in  
09:27 15 life. In our lives, we often look at one fact and conclude from  
16 it that another fact exists. In law we call this "inference."  
17 A jury is allowed to make reasonable inferences. Any inference  
18 you make must be reasonable and must be based on the evidence in  
19 the case.

09:27 20 You may have heard the phrases "direct evidence" and  
21 "circumstantial evidence." Direct evidence is proof that does  
22 not require an inference, such as the testimony of someone who  
23 claims to have personal knowledge of a fact. Circumstantial  
24 evidence is proof of a fact, or a series of facts, that tend to  
09:28 25 show that some other fact is true.

1 As an example, direct evidence that it is raining is  
2 testimony from a witness who says, "I was outside a minute ago  
3 and I saw it raining." Circumstantial evidence that it is  
4 raining is the observation of someone entering a room carrying a  
09:28 5 wet umbrella.

6 The law makes no distinction between the weight to be  
7 give to either direct or circumstantial evidence. You should  
8 decide how much weight to give to any evidence. In reaching  
9 your verdict, you should consider all the evidence in this case,  
09:28 10 including the circumstantial evidence.

11 You must decide whether the testimony of each of the  
12 witnesses is truthful and accurate, in part, in whole, or not at  
13 all. You also must decide what weight, if any, you give to the  
14 testimony of each witness. In evaluating the testimony of any  
09:29 15 witness, including any party to the case, you may consider,  
16 among other things:

17 The ability and opportunity the witness had to see,  
18 hear, or know the things that the witness testified about;

19 The witness's memory;

09:29 20 Any interest, bias, or prejudice the witness may have;

21 The witness's intelligence;

22 The manner of the witness while testifying;

23 And the reasonableness of the witness's testimony in  
24 light of all the evidence in the case.

09:29 25 You may consider statements given by the parties or

1 witnesses under oath before trial as evidence of the truth of  
2 what he said or they said in the earlier statements, as well as  
3 in deciding what weight to give his testimony.

4 With respect to other witnesses, the law is different.

09:29 5 If you decide that, before the trial, one of these witnesses  
6 made a statement not under oath or acted in a manner that is  
7 inconsistent with his testimony here in court, you may consider  
8 the earlier statement or conduct only in deciding whether this  
9 testimony here in court was true and what weight to give his  
09:30 10 testimony here in court.

11 In considering a prior inconsistent statement or  
12 conduct, you should consider whether it was simply an innocent  
13 error or an intentional falsehood and whether it concerns an  
14 important fact or an unimportant detail.

09:30 15 It is proper for a lawyer to meet with any witness in  
16 preparation for trial.

17 You may find the testimony of one witness or a few  
18 witnesses more persuasive than the testimony of a larger number.  
19 You need not accept the testimony of the larger number of  
09:30 20 witnesses.

21 The law does not require any party to call as a  
22 witness every person who might have knowledge of the facts  
23 related to this trial. Similarly, the law does not require any  
24 party to present as exhibits all papers and things mentioned  
09:30 25 during the trial.

1           You have heard witnesses give opinions about matters  
2 requiring special knowledge or skill. You should judge this  
3 testimony in the same way that you judge the testimony of any  
4 other witness. The fact that such person has given an opinion  
09:31 5 does not mean that you are required to accept it. Give the  
6 testimony whatever weight you think it deserves, considering the  
7 reasons given for the opinion, the witness's qualifications, and  
8 all the other evidence in the case.

9           Certain demonstrative exhibits have been shown to you.  
09:31 10 Those demonstrative exhibits are used for convenience and to  
11 help explain the facts of the case. They are not themselves  
12 evidence or proof of any facts.

13           When I say a particular party must prove something by  
14 "a preponderance of the evidence," or when I use the expression  
09:31 15 "if you find," or "if you decide," this is what I mean: When  
16 you have considered all the evidence in the case, you must be  
17 persuaded that it is more probably true than not true.

18           Plaintiff has brought this lawsuit under a federal law  
19 called the Americans With Disabilities Act, which is often  
09:32 20 referred to by its initials, the "ADA." Under the ADA, it is  
21 illegal for an employer to discriminate against a person on the  
22 basis of a disability if that person is qualified to do the  
23 essential functions of her job and the employer is aware of her  
24 limitations.

09:32 25           In this case, Plaintiff claims that Defendant

1 discriminated against Marlo Spaeth by not providing her with a  
2 reasonable accommodation, namely, a change of her work schedule;  
3 by terminating her employment; and by not reinstating her.

4 Reinstating Ms. Spaeth. Defendant denies that it discriminated  
09:32 5 against Ms. Spaeth and says that Ms. Spaeth's employment was  
6 terminated because of her failure to reliably attend work and to  
7 adhere to the schedule Defendant set, specifically her  
8 repeatedly leaving early before her shift was over. Defendant  
9 contends that reliable attendance and working the complete shift  
09:33 10 were essential to performing the job she was hired for.

11 As you listen to these instructions, please keep in  
12 mind that many of the terms I will use have a special meaning  
13 under the law. So please remember to consider the specific  
14 definitions I give you, rather than using your own opinion as to  
09:33 15 what these terms mean.

16 In deciding the EEOC's claims, you should not concern  
17 yourselves with whether Walmart's actions were wise or fair.  
18 Rather, your concern is only whether the EEOC has proved that  
19 Walmart discriminated against Marlo Spaeth because of her  
09:33 20 disability.

21 The EEOC's first claim is that Walmart unlawfully  
22 refused to give Ms. Spaeth a "reasonable accommodation." To  
23 succeed, the EEOC must prove five things by a preponderance of  
24 the evidence. Actually three things here is what I have:

09:34 25 1. Marlo Spaeth was a qualified individual with a

1 disability.

2 2. Walmart was aware that Ms. Spaeth needed an  
3 accommodation due to her disability, either because Ms. Spaeth  
4 requested one or otherwise. And,

09:34 5 3. Defendant failed to provide Ms. Spaeth with a  
6 reasonable accommodation.

7 If you find that Plaintiff proved each of these things  
8 by a preponderance of the evidence, you should turn to the issue  
9 of plaintiff's damages. If you find the Plaintiff has failed to  
09:34 10 prove any of these things by a preponderance of the evidence,  
11 your verdict should be for the Defendant on this claim.

12 Under the ADA, the term "disability" means a physical  
13 or mental impairment that "substantially limits" a "major life  
14 activity." I will now define some of these terms in more  
09:35 15 detail. Again, I remind you to consider the specific  
16 definitions I give you, and not use your own opinion as to what  
17 these terms mean.

18 Under the ADA, an impairment "substantially limits" a  
19 major life activity if it impairs the individual's ability to  
09:35 20 perform the activity as compared to the average person in the  
21 general population. Major life activities are those that an  
22 average person can do without much difficulty. Thinking,  
23 speaking, and brain function are all major life activities. The  
24 term "substantially limits" is not meant to be a demanding  
09:35 25 standard, and a condition does not have to prevent, or



1 significantly or severely restrict, a person from performing the  
2 major life activity to be considered a disability.

3 It is not required that there be any medical analysis  
4 to make the determination of whether someone is substantially  
09:36 5 limited in a major life activity. For example, deafness  
6 substantially limits hearing; blindness substantially limits  
7 seeing; an intellectual disability -- formerly termed mental  
8 retardation -- substantially limits brain function; and autism  
9 substantially limits brain function. Down syndrome is a genetic  
09:36 10 disorder which varies in severity but causes lifelong  
11 intellectual disability and developmental delays.

12 If you find that Ms. Spaeth's impairments  
13 substantially limit one major life activity, you must find that  
14 her impairments are a disability even if they do not limit any  
09:36 15 other major life activity.

16 Under the ADA, Marlo Spaeth was "qualified" if she had  
17 the skill, experience, education, and other requirements for the  
18 job and could do the job's essential functions, either with or  
19 without a reasonable accommodation. You should only consider  
09:37 20 Ms. Spaeth's abilities at the time of Ms. Spaeth's termination.

21 Not all job functions are "essential." Essential  
22 functions are a job's fundamental duties. In deciding whether a  
23 function is essential, you may consider the reasons the job  
24 exists, the number of employees Walmart has to do that kind of  
09:37 25 work, the degree of specialization the job requires, Walmart's

1 judgment about what is required, the consequences of not  
2 requiring an employee to satisfy that function, and the work  
3 experience of others who held the position.

4 In addition to specific job requirements, an employer  
09:37 5 may have general requirements for all employees. For example,  
6 the employer may generally require regular and timely  
7 attendance.

8 Under the ADA, to "accommodate" a disability is to  
9 make some change that will let a person with a disability  
09:38 10 perform the job. An accommodation is "reasonable" if it is  
11 effective and its costs are not clearly disproportionate to the  
12 benefits that it will produce.

13 A reasonable accommodation may include a change in  
14 such things as ordinary work rules, facilities, conditions, or  
09:38 15 schedules, but does not include elimination or change of  
16 essential job functions, assignment of essential job functions  
17 to other employees, or lower productivity or performance  
18 standards.

19 EEOC has the burden of proving that Walmart was aware  
09:38 20 of Marlo Spaeth's need for an accommodation for her disability.  
21 Where the need for an accommodation is obvious, the employer  
22 must initiate an informal interactive process with the employee  
23 or those acting on the employee's behalf, to determine whether a  
24 reasonable accommodation should be provided. Where the need for  
09:39 25 an accommodation is not obvious, however, the disabled employee,

1 or those acting on the employee's behalf, must make their  
2 employers aware of any medically necessary accommodation.

3           Once an employer is aware of the employee's disability  
4 and knows or should have known that there is a need for a  
09:39 5 reasonable accommodation, the employer must discuss with the  
6 employee or, if necessary, with her doctor, whether there is a  
7 reasonable accommodation that will permit the employee to  
8 perform the job. Both the employer and the employee must  
9 cooperate in this interactive process in good faith. If an  
09:39 10 employer has a question regarding a request for a reasonable  
11 accommodation, the employer must undertake to find out the  
12 answer to the question.

13           Neither party can win this case simply because the  
14 other did not cooperate in this process, but you may consider  
09:40 15 whether a party cooperated in this process when deciding whether  
16 a reasonable accommodation existed and when considering whether  
17 to award punitive damages.

18           You have heard evidence that Marlo Spaeth's sister,  
19 Amy Jo Stevenson, claims to have made a request for a reasonable  
09:40 20 accommodation for Marlo Spaeth's disability subsequent to the  
21 termination of Marlo Spaeth's employment.

22           You should not consider evidence of a request for a  
23 reasonable accommodation, if any, made after Marlo Spaeth's  
24 termination in determining whether the EEOC has met its burden  
09:40 25 of proving Walmart violated the Americans With Disabilities Act

1 by terminating Marlo Spaeth's employment. You may consider such  
2 evidence, if any, made before Walmart's decision denying her  
3 request for reinstatement.

4 Under the ADA, Walmart does not need to accommodate  
09:41 5 Marlo Spaeth if it would cause an "undue hardship" to its  
6 business. An "undue hardship" is something too costly or  
7 something that is so disruptive that it would fundamentally  
8 change the nature of Walmart's business or how Walmart runs its  
9 business.

09:41 10 Walmart must prove to you by a preponderance of the  
11 evidence that Marlo Spaeth's proposed accommodation would be an  
12 "undue hardship." In deciding this issue, you should consider  
13 the following factors:

14 The nature and cost of the accommodation;

09:41 15 Walmart's overall financial resources. This might  
16 include the size of its business, the number of people it  
17 employs, and the types of facilities it runs;

18 The financial resources of the facility where the  
19 accommodation would be made. This might include the number of  
09:42 20 people who work there and the impact that the accommodation  
21 would have on its operations and costs; and

22 The way that Walmart conducts its operations. This  
23 might include its workforce structure; the location of its  
24 facility where the accommodation would be made compared to  
09:42 25 Walmart's other facilities; and the relationship between these

1 facilities.

2 If Walmart provided an accommodation to Marlo Spaeth  
3 that was not required by the ADA in the first place, the law  
4 does not require Walmart to continue to provide that  
09:42 5 accommodation. Rather, Walmart may lawfully discontinue the  
6 accommodation at any time and not provide it again.

7 Elements of an ADA discriminatory termination claim.

8 The EEOC's second claim is that Walmart discriminated  
9 against Ms. Spaeth by discharging her from her employment  
09:42 10 because of her disability or because of the need to accommodate  
11 her disability. To succeed on this claim, the EEOC must prove  
12 four things by a preponderance of the evidence:

13 1. Ms. Spaeth had a disability. I have defined  
14 "disability" earlier.

09:43 15 2. Ms. Spaeth was qualified to perform the job with  
16 reasonable accommodation.

17 3. Walmart discharged Ms. Spaeth. And,

18 4. Walmart would not have discharged Ms. Spaeth if  
19 she did not have a disability or if she did not need an  
09:43 20 accommodation, but everything else had remained the same.

21 If you find that the EEOC has proved each of these  
22 things by a preponderance of the evidence, you should turn to  
23 the issue of Marlo Spaeth's damages. If you find that the EEOC  
24 has failed to prove any of these things by a preponderance of  
09:43 25 the evidence, your verdict should be for Walmart.

1 To succeed in this case, Plaintiff must prove four  
2 things by a preponderance of the evidence:

3 These are the elements for the ADA -- under the ADA  
4 for a failure to reinstate claim.

09:44 5 To succeed on this claim, Plaintiff must prove four  
6 things by a preponderance of the evidence:

7 1. Marlo Spaeth, or someone on her behalf, requested  
8 reinstatement of her position at Walmart after July 10th, 2015.

9 2. Marlo Spaeth, with or without reasonable  
09:44 10 accommodation, was "qualified" for the position she requested  
11 reinstatement for after July 10th, 2015;

12 3. Walmart did not reinstate Marlo Spaeth for her  
13 position at the company despite her request after July 10th,  
14 2015; and

09:44 15 4. Walmart did not reinstate Marlo Spaeth because she  
16 has Down syndrome or because of the need to reasonably  
17 accommodate her disability.

18 If you find that the EEOC has proved each of these  
19 things by a preponderance of the evidence, you should turn to  
09:44 20 the issue of Marlo Spaeth's damages. If you find that the EEOC  
21 has failed to prove any of these things by a preponderance of  
22 the evidence, your verdict should be for Walmart.

23 If you find that the EEOC has proved any of its claims  
24 against Walmart, then you must decide what amount of damages, if  
09:45 25 any, she is entitled to recover for those claims. The EEOC must

1 prove Ms. Spaeth's damages by a preponderance of the evidence.

2 If you find that the EEOC has failed to prove any of  
3 its claims, then you will not consider the question of damages.

4 You may award compensatory damages to Marlo Spaeth  
09:45 5 only for injuries that have been proved by a preponderance of  
6 the evidence -- that have been proved by a preponderance of the  
7 evidence were caused by Defendant's wrongful conduct.

8 Your award must be based on evidence and not  
9 speculation or guesswork. This does not mean, however, that  
09:45 10 compensatory damages are restricted to the actual loss of money;  
11 they include both the physical and mental aspects of injury,  
12 even if they are not easy to measure.

13 In calculating damages, you should not consider the  
14 issue of lost wages or benefits. The court will calculate and  
09:46 15 determine any damages for past or future lost wages and  
16 benefits, if needed. You should consider the following types of  
17 compensatory damages, and no others:

18 The mental and emotional pain and suffering that Marlo  
19 Spaeth experienced and is reasonably certain to experience in  
09:46 20 the future.

21 No evidence of the dollar value of mental and  
22 emotional pain and suffering has been or needs to be introduced.  
23 There is no exact standard for setting the damages to be awarded  
24 on account of pain and suffering. You are to determine an  
09:46 25 amount that will fairly compensate for the injury she sustained.

1           If you find for the EEOC, you may, but are not  
2 required to, assess punitive damages against the Defendant. For  
3 purposes of punitive damages -- the purposes of punitive damages  
4 are to punish a defendant for its conduct and to serve as an  
09:47 5 example or warning to Walmart and others not to engage in  
6 similar conduct in the future.

7           The EEOC must prove by a preponderance of the evidence  
8 that punitive damages should be assessed against Walmart. You  
9 may assess punitive damages only if you find that the conduct of  
09:47 10 Walmart was in reckless disregard of Marlo Spaeth's rights. An  
11 action is in reckless disregard of Marlo Spaeth's rights if  
12 taken with knowledge that it may violate the law.

13           The EEOC must prove by a preponderance of the evidence  
14 that Defendant's managerial employees and officers acted within  
09:47 15 the scope of their employment and in reckless disregard of  
16 Ms. Spaeth's right not to be discriminated against. In  
17 determining whether a Walmart employee was a managerial  
18 employee, you should consider the kind of authority Walmart gave  
19 them, the amount of discretion they had in carrying out their  
09:47 20 job duties and the manner in which they carried them out.

21           If you find that punitive damages are appropriate,  
22 then you must use sound reason in setting the amount of those  
23 damages. Punitive damages, if any, should be in an amount  
24 sufficient to fulfill the purpose that I have described to you,  
09:48 25 but should not reflect bias, prejudice, or sympathy toward



1 either or any party. In determining the amount of punitive  
2 damages, you should consider the following factors:

3 The reprehensibility of Walmart's conduct;

4 The impact of Walmart's conduct on Marlo Spaeth;

09:48 5 The relationship between Marlo Spaeth and Walmart;

6 The likelihood that Walmart would repeat the conduct  
7 if an award of punitive damages is not made;

8 The relationship of any award of punitive damages to  
9 the actual harm Marlo Spaeth suffered; and

09:48 10 Walmart's financial condition.

11 So that concludes my introductory or the instructions  
12 that really govern the substance. I have some brief closing  
13 instructions, but first you'll hear the arguments of counsel.

14 Walmart is the plaintiff, Walmart has the burden of  
09:49 15 proof. Or, I'm sorry, EEOC is the plaintiff, EEOC has the  
16 burden of proof. So the EEOC will argue first and then the EEOC  
17 will have an opportunity for brief rebuttal after Walmart makes  
18 its argument.

19 Okay. Hope that's the only mistake I made. Okay,  
09:49 20 Ms. Vance, you may close.

21 MS. VANCE: Thank you, Your Honor.

22 PLAINTIFF CLOSING ARGUMENT

23 MS. VANCE: Good morning, members of the jury.

24 Marlo Spaeth did her part. She thrived in her job at  
09:50 25 Walmart for over 15 years. The annual reviews, year after year,

1 show Marlo meets expectations and is a solid performer.

2 Marlo's annual reviews shows she had zero absences and  
3 zero tardies for nine years. In six of those nine evaluations,  
4 Marlo exceeds Walmart's expectations in the area of attendance.

09:51 5 Marlo's annual reviews show her strengths include  
6 dependability and reliability -- let's see Exhibit 13 -- with  
7 her manager in 2010 praising her for being here when scheduled  
8 and willing to do what we ask. Thank you.

9 Her manager in 2012 praising Marlo because she is here  
09:51 10 when scheduled, and her manager in 2014 commending her for zero  
11 active absences in a six-month rolling period.

12 Walmart could count on Marlo. She showed up, she did  
13 her work. She met or exceeded expectations and she did her  
14 part.

09:51 15 Walmart, on the other hand, did not do its part.  
16 Walmart violated the Americans With Disabilities Act. The ADA  
17 promises equal employment opportunity for people with  
18 disabilities. The ADA promises that you can get a reasonable  
19 accommodation at work if you need it because of your disability,  
09:52 20 as long as it's not an undue hardship. Under that law, Marlo  
21 Spaeth has the right to an accommodated schedule. And what  
22 we've learned this week is that she needs that accommodation,  
23 that routine in order to thrive in her job.

24 Accommodating Marlo's need for routine that was based  
09:52 25 on Down syndrome means that Marlo gets to come into work, clock

1 in, get her aisle straightened, get all the shelves of her  
2 department stocked and organized, process all the returns they  
3 give her at the front desk, help all the customers that come  
4 through, clock out, and catch her bus.

09:53 5 With that routine Marlo performs the essential  
6 functions of her job. She meets or exceeds her -- Walmart's  
7 expectations. She has excellent attendance. She contributes to  
8 Walmart's business model. She promotes Walmart's 10-foot rule  
9 to provide excellent customer service to any customer that comes  
09:53 10 within 10 feet of her. She wears her Walmart vest with pride.  
11 Walmart rewards Marlo with raises every year. Walmart thanks  
12 Marlo with bonus checks.

13 And do you remember what happens when Marlo gets her  
14 bonus checks? Everyone at home says good work, Marlo, that  
09:53 15 means you're taking us all out to dinner.

16 And that's what she gets to do. She gets to be a  
17 career woman. She gets that pride, that sense of success at her  
18 career. She gets to say to her mom, hey, look, I got my bonus  
19 check, tonight I'm taking us all out for dinner.

09:54 20 We heard Attorney Burnett in his opening say Walmart  
21 is not in the business of getting rid of good employees. That's  
22 probably true for the most part. But here in this case, for  
23 Marlo Spaeth, what we learned is that Walmart is not in the  
24 business of getting rid of good employees until they need a  
09:54 25 reasonable accommodation.

1 In November of 2014, the Manitowoc managers got the  
2 directive from headquarters, from the home office: stop  
3 manually scheduling employees. Everybody must conform to the  
4 new computerized system, no exceptions.

09:55 5 For the first time in 15 years this meant Walmart  
6 scheduled Marlo outside of her availability. Instead of noon to  
7 4:00, Marlo had to work longer and later shifts, 1:00 to 5:30.  
8 And Walmart has meticulously documented what happened next.  
9 Marlo couldn't make it to 5:30. She clocked out early.

09:55 10 When confronted before -- excuse me. When confronted  
11 for leaving before 5:30, Marlo asked to have her schedule of  
12 noon to 4:00. Julie Stern, Walmart's supervising manager,  
13 testified that every time she talked to Marlo about leaving  
14 early Marlo asked to work noon to 4:00. Walmart started  
09:55 15 disciplining her.

16 The conflict and the stress from that conflict only  
17 made it worse. The confrontations and the disciplinary meetings  
18 only made it worse. Marlo started clocking out earlier. And  
19 Marlo even had some no call/no show days, which was very out of  
09:56 20 the ordinary for her. The employee with years and years of zero  
21 absences had attendance problems now.

22 Julie Stern admitted that at every coaching Marlo  
23 asked to work noon to 4:00. It was obvious.

24 Marlo couldn't handle the longer and later shifts.  
09:56 25 She couldn't handle the disruption to the routine that had

1 helped her thrive for so long. Marlo couldn't conform herself  
2 to the computer generated schedule, she needed a reasonable  
3 accommodation.

09:56 4 Instead of following its own store policies to get  
5 Marlo an accommodation packet and send it to the ADA office in  
6 Bentonville, Arkansas, Walmart managers focused their energy on  
7 documenting Marlo's attendance infractions and counting up her  
8 points. They continued to write her up. Instead of following  
9 the law and recognizing Marlo's rights to a reasonable  
09:57 10 accommodation under the ADA, they counted up all her attendance  
11 points and they fired her. Slowly.

12 At that point, Walmart managers had documented 17  
13 points. Right before their very eyes they had all the proof in  
14 the world that Marlo couldn't adapt to such a big change in her  
09:57 15 routine because she has a disability. Marlo needed an  
16 accommodated schedule in order to function at her job. It was  
17 obvious.

18 Now, in case there is ever any doubt, Amy Jo  
19 Stevenson, her sister, got involved. When Amy Jo learned that  
09:58 20 Marlo was getting scheduled to work to 5:30, she called Karen  
21 Becker, the contact for the family for many years. Amy told  
22 Karen, "You have to change Marlo's schedule back. She can't  
23 handle working that late. She can't do it."

24 So at this point Marlo had repeatedly told Walmart she  
09:58 25 needed an accommodation, and now Amy Jo Stevenson told Walmart

1 Marlo needed an accommodation because of her disability.

2 Walmart refused to bend on the insistence that  
3 everybody must conform to the computerized schedule. Instead of  
4 even considering a schedule accommodation for Marlo, Walmart  
09:59 5 fired her.

6 Amy Jo gets involved again, she gets a meeting with  
7 Walmart management. She's going to get Marlo her job back. She  
8 does her homework. You heard Amy Jo testify she wanted to  
9 educate herself about Marlo's rights. She goes online, she  
09:59 10 finds a fact sheet about reasonable accommodations under the  
11 ADA, she prints it out. She collects the termination paperwork  
12 from Marlo showing eligibility for rehire.

13 Amy Jo Stevenson sits down with those two documents  
14 and says: "Marlo has a right to a reasonable accommodation  
09:59 15 under the ADA. You should have accommodated her schedule when  
16 she asked. You should have accommodated her schedule when I  
17 called in and spoke to Karen. Let's make this easy, Marlo's  
18 eligible for rehire, give Marlo her job back and accommodate her  
19 schedule to the noon to 4:00 shift she's had for all these  
10:00 20 years."

21 It was obvious. Marlo needed an accommodation because  
22 of her disability, and Amy Jo requested that accommodation plain  
23 as day. You heard the testimony.

24 Walmart managers could have reinstated Marlo with a  
10:00 25 simple reactivation process in the system. It only takes a

1 matter of minutes. But did Walmart reinstate Marlo? No, they  
2 investigated. They cut off all communications to the family.  
3 They reviewed all the attendance points. They reviewed all the  
4 coaching documents that Marlo had to sign. They wanted to make  
10:00 5 sure that all the documentation they had of these attendance  
6 violations had the I's crossed and the T's dotted. The ethics  
7 investigator was satisfied that Marlo's record had all that  
8 documentation in place to justify the termination based on  
9 attendance points and they stuck to the termination decision.

10:01 10 Robin Castro called Marlo and told her that Walmart  
11 would not be able to rehire her. Marlo would not get her job  
12 back.

13 Now it's time for you to do your part. EEOC asks you  
14 to return a verdict for the Plaintiff. We have met our burden  
10:01 15 of proof. In your jury instructions you'll see that you must  
16 return a verdict for EEOC, for Plaintiff, if you find that we  
17 have met our burden of proof by a preponderance of the evidence.  
18 That means it's probably more true than not.

19 You'll have all the admitted evidence in the record  
10:02 20 with you in deliberations. You'll have the binders that the  
21 witnesses have been using. So now I want to walk you through  
22 the verdict sheet and give you all the evidence you need to  
23 render your verdict.

24 "Question 1. During the time of her employment with  
10:02 25 Walmart was Marlo Spaeth a person with a disability?"

1           You heard manager after manager testify that they knew  
2 Walmart -- excuse me, that they knew, when they first saw Marlo  
3 Spaeth, that she had Down syndrome. So we know she is a person  
4 with a disability, and the question is qualified person with a  
10:02 5 disability.

6           So in the Plaintiff's exhibit binder I want to direct  
7 you to some of the evidence that proves Question 1.

8           You'll find all of Marlo's annual reviews, starting at  
9 Exhibit 2, going through Exhibit 18. You've seen the highlights  
10:03 10 during the trial and you'll be able to read them all if you care  
11 to.

12           Marlo met or exceeded expectations and Marlo got a  
13 raise every year until she was scheduled outside of her  
14 availability.

10:03 15           At Exhibit 19 you'll find a commendation certificate  
16 for Marlo Spaeth.

17           This evidence proves Marlo Spaeth was qualified to  
18 perform the essential functions of her job with a reasonable  
19 accommodation for her schedule.

10:03 20           Then you need to go to Exhibits 35, 36, and 37.

21           Lectrice, can we please see -- or highlight from 37.

22           After Walmart fired Marlo they did an investigation,  
23 and during that investigation all three managers were asked if  
24 Marlo had any performance problems when she was terminated.

10:04 25           This is Exhibit 37. This was J., Julie Stern's



1 answer. You'll find the same answer in Exhibit 35 and  
2 Exhibit 36 as well.

3 Robin Castro, Bonnie Popp, and Julie Stern reported  
4 that there were no problems with job performance at the time of  
10:04 5 termination for Marlo. The termination was based on attendance  
6 only.

7 Thank you.

8 With that evidence you should answer Question 1 "Yes."

9 So, "Question 2. Was Walmart aware that Marlo Spaeth  
10:04 10 needed an accommodation due to her disability?"

11 We can't dispute it. It's true that Marlo Spaeth  
12 never walked in to Karen Becker's office and said:

13 *Excuse me, Karen, I've been reading up under my rights*  
14 *under the Americans With Disabilities Act, and there's a section*  
10:05 15 *in the statute about my right to a reasonable accommodation*  
16 *which would help me perform the essential functions of my job*  
17 *provided it's not an undue hardship for my employer. I would*  
18 *like to engage in the interactive process with you to determine*  
19 *the most appropriate accommodation for my circumstances. Would*  
10:05 20 *you please print out the accommodation request paperwork that I*  
21 *would need in order to submit a request to work noon to 4:00*  
22 *schedule.*

23 It's true, Marlo didn't do that. She can't. What  
24 Marlo said was: "I'm tired." "I can't work too late." "I'm  
10:06 25 afraid I'll miss my bus." "It's too hot to work that late."

1 "I'll get sick if I miss supper." "Why can't I just work noon  
2 to 4:00 like I used to?"

3 Marlo told them she needed an accommodation because of  
4 her disability in her own words. It was obvious. Nobody's too  
10:06 5 hot to work until 5:30 in January in Manitowoc. Marlo's own  
6 words were enough to make Walmart aware that something was going  
7 on with Marlo. She wasn't coping well with this new schedule  
8 because of her disability.

9 We've heard manager after manager come in here and  
10:06 10 testify that they never imagined that Marlo needed a schedule  
11 accommodation because she has Down syndrome. They had no idea  
12 Marlo couldn't adapt to a change in routine because she has a  
13 disability. Maybe they thought it was really just an attitude  
14 problem.

10:07 15 But do you remember how Walmart's managers also knew,  
16 and testified, that when you try to teach Marlo a new task she  
17 needed extra support? When Marlo had to branch out beyond  
18 towels and start folding bath rugs, she was so stressed out by  
19 the new routine that she went home and told her mother, "They  
10:07 20 said I have to clean the bathrooms." Adjusting to that new  
21 routine of folding towels, then also folding bath rugs, required  
22 extra support. Karen Becker in HR had to get involved and  
23 straighten everything out. Marlo needed that extra reassurance  
24 and that extra support to adapt to the new routine.

10:07 25 And remember all the testimony from managers about the

1 process of adding returns to Marlo's job routine? Marlo's  
2 supervisors had to do the returns with her to teach her the  
3 task. They had to walk her through the process in order to add  
4 folding towels, and then folding bath rugs, and then processing  
10:08 5 returns, to her routine.

6 The testimony was that it took a couple weeks of doing  
7 returns with Marlo before it became part of her routine.

8 So when they want you to think they know Marlo well  
9 and that they were good managers to Marlo they testify about how  
10:08 10 changes to her routine require extra support and guidance. They  
11 testify about how they knew that and everybody knew that about  
12 working with Marlo. But when it comes to honoring her right to  
13 a schedule accommodation, well, then Walmart managers had no  
14 idea that part of Marlo's life as a person with Down syndrome is  
10:09 15 that she can't easily adjust to changes in routine.

16 The other facts that prove Walmart was aware that  
17 Marlo needed a schedule accommodation due to disability are:

18 Marlo went from attendance that exceeds expectations  
19 to an employee struggling with attendance problems. That should  
10:09 20 have raised questions.

21 You also need to look at Walmart's Exhibits 1006 and  
22 1007. What you'll see is that Marlo kept coming into work, she  
23 kept showing up and clocking in -- oftentimes early because they  
24 had moved her start time to 1:00 -- and doing her job tasks.  
10:09 25 She just couldn't handle staying till 5:30 p.m.

1           They've meticulously documented the struggle that  
2 Marlo faced because she has Down syndrome, in those exhibits.

3           When Marlo went from excellent attendance to racking  
4 up all those early departure points, she proved to them that  
10:10 5 because of her disability she couldn't handle the new schedule.

6           Marlo kept asking to work noon to 4:00. That's  
7 another fact.

8           Then the other evidence to consider for Question 2 is  
9 Marlo showed them that she didn't understand, she wasn't getting  
10:10 10 it. They knew she needed help because of the cognitive  
11 limitations, the developmental delays that are caused by Down  
12 syndrome. Here you need to go to Exhibit 23. This exhibit  
13 shows you what a conversation with Marlo about her schedule was  
14 like. Julie Stern is her manager, Julie Stern writes the email  
10:11 15 in Exhibit 23.

16           "I did tell her that the next two days she is  
17 scheduled 1:00 to 5:30, and I expect her to work that schedule.

18           "She said she only works noon to 4:00."

19           Okay. Picture that. You're in a conversation with a  
10:11 20 person with Down syndrome and you say "you're scheduled 1:00 to  
21 5:30, I expect you to work that schedule," and the reply you get  
22 is "I only work noon to 4:00."

23           Thank you.

24           Now, Julie Stern testified that there was never any  
10:11 25 point in time where she thought Marlo didn't understand her.

1 But, members of the jury, you get to use your common sense.

2 That was not a conversation where two people understood each

3 other. You can decide if Marlo's answer shows she didn't

4 understand. She has Down syndrome, in order to make a big

10:12 5 change in her routine like that she needed extra support. She

6 needed a medically necessary accommodation, it was obvious.

7 Your answer to Question 2 should be "Yes."

8 "Question 3. Did Walmart fail to provide Marlo Spaeth

9 with a reasonable accommodation?"

10:12 10 And for some of these you're going to need to go back

11 to your jury instructions to get your definitions. Make sure

12 you are using the legal terms according to the judge's

13 instructions.

14 You'll see from Jury Instruction 4.06 the definition:

10:12 15 "A reasonable accommodation may include a change in

16 such things as ordinary work rules, facilities, conditions, or

17 schedules."

18 So right there in the jury instructions you see

19 reasonable accommodations include schedule changes.

10:13 20 Now, you should also review Walmart's own policies.

21 Exhibit 29. Walmart lists part-time or modified work schedules

22 as one of the examples of a reasonable accommodation.

23 And let's remember --

24 Thank you.

10:13 25 -- we're talking about 90 minutes here, the difference

1 between 4 p.m. and 5:30. Remember, Julie Stern testified that  
2 this was such a minor change. The accommodation was reasonable,  
3 the accommodation was never at any point even considered by  
4 Walmart. Your answer to Question 3 should be "Yes."

10:14 5 "Question 4. Would providing Marlo Spaeth an  
6 accommodation have posed an undue hardship to Walmart's  
7 business?"

8 The evidence that will help you answer Question 4  
9 starts at Exhibit 23. That's that Julie Stern email, where she  
10:14 10 starts documenting Marlo's difficulties adapting to the new  
11 schedule. It's from December 17th, 2014. And, in general, take  
12 a good look at that email and you'll find -- one of the things  
13 you'll find is this sentence:

14 "If she is not going to work the entire shifts, then  
10:14 15 there are other associates in the store that would be more than  
16 happy to have those hours."

17 That's the solution right there. Think about it.  
18 Marlo -- if they did this -- Marlo could clock out at 4 p.m. and  
19 catch her bus, other associates can have those hours and would  
10:15 20 be more than happy. Customers who came in at 4:45 would be  
21 served by these more-than-happy associates. The domestic  
22 departments would get continuously zoned after 4:0 to 5:30 p.m.  
23 They had the answer right in front of them: Marlo's happy,  
24 customers are happy, Walmart's happy. If they would have just  
10:15 25 done that everyone would benefit. That's not undue hardship.

1 Thank you.

2 The other evidence to remember as you look at  
3 Question 4 is from Karen Becker. Remember that she testified  
4 that when Marlo worked noon to 4:00 for 15 years there was never  
10:15 5 a problem staffing the domestics department. Walmart always had  
6 multiple employees who were assigned to domestics. Even though  
7 for 15 years Marlo's schedule ended at 4:00, they always had  
8 coverage in the domestics department. That's not undue  
9 hardship.

10:16 10 And notice, Walmart hasn't presented any evidence  
11 showing that during those 15 years when Marlo left at 4:00 the  
12 Manitowoc store sales were affected in any way. Your answer to  
13 Question 4 should be "No."

14 "Question 5. Did Walmart violate the Americans With  
10:16 15 Disabilities Act by terminating Marlo Spaeth because of her  
16 disability?"

17 For Question 5 you should think through Exhibit 1,  
18 that's the history of Marlo's personnel file of her  
19 availability. It's in chronological order. And you'll see that  
10:17 20 the oldest available forms show that through the years Marlo is  
21 available to be scheduled approximately noon to approximately  
22 4:00, but in February 2015 you see the new availability that  
23 Bonnie Popp had Marlo sign.

24 And think about the timing there. Marlo's schedule  
10:17 25 changed in November 2014. By December, it's already a problem.

1 Julie Stern writes out the email to managers to make sure  
2 everybody knows what's going on.

3 The email shows Marlo asked to work noon to 4:00; that  
4 Marlo says, "Why can't I just work noon to 4:00 like I used to?"  
10:17 5 That when Julie says, "I expect you to work to 5:30," Marlo  
6 answers, "I work noon to 4:00." Exhibit 23 shows that Marlo  
7 told them "I'll get sick if I miss supper." "I'm afraid I'll  
8 miss my bus."

9 So that's December. Then Marlo racks up eight more  
10:18 10 early departures. When you go to deliberations you can look at  
11 Exhibit 1013. Marlo has eight early departures leading up to  
12 February 13th, 2015.

13 So at this point isn't it obvious that Marlo can't  
14 make the adjustment? But what does Bonnie Popp do? Instead of  
10:18 15 going into the personnel office and grabbing the accommodation  
16 packet and sitting down with Marlo to start a request for  
17 reasonable accommodation, Bonnie goes to the personnel office to  
18 get a blank availability form.

19 Marlo had been scheduled outside of her availability  
10:18 20 for four months at this point, but the paperwork hadn't caught  
21 up to it yet. Marlo hasn't been coping with the later and  
22 longer shifts, but Bonnie decides we're not going to sit down  
23 with an accommodation packet and fill out your request  
24 paperwork, we're going to sit down with a blank availability  
10:19 25 form. Bonnie's going to fill out all the times. Bonnie tells



1 Marlo she needs to change her availability, she needs to sign  
2 off. She needs to sign the new availability form. Marlo does  
3 as she's told and signs it, and now the table is set.

4 By February 2015, Marlo has already had one coaching,  
10:19 5 she racked up an additional eight early departures, she's only a  
6 few points away from getting fired for those early departures,  
7 and Walmart doesn't budge. Walmart won't even consider a  
8 schedule accommodation. The new system demands that the  
9 associates expand their availability to work or they won't get  
10:20 10 any hours.

11 With this continued insistence on working the new  
12 schedule to 5:30 p.m., Marlo just racks up more points. She  
13 eventually gets fired. It all could have been prevented if  
14 Walmart would have been willing to give Marlo an accommodated  
10:20 15 schedule.

16 The answer to Question 5 should be "Yes."

17 "Question 6. Did Walmart violate the Americans With  
18 Disabilities Act by failing to reinstate Marlo Spaeth because of  
19 her disability?"

10:20 20 Here you need to review Exhibits 20 and 26. Marlo was  
21 eligible for rehire, that's in her termination paperwork, and  
22 Walmart has a policy. That's Exhibit 26, for reinstatement and  
23 rehire.

24 Karen Becker testified she could have reactivated an  
10:21 25 employee in the system in a matter of minutes.

1           Lee Spude, the market human resources manager above  
2 the Manitowoc store, he testified that he has the authority at  
3 his level of management to approve a reinstatement. It's not a  
4 complicated process.

10:21 5           Amy Jo asked for rehire -- well, Amy Jo asked that  
6 Marlo get her job back. She explained why Marlo has a right to  
7 get her job back with an accommodated schedule under the ADA,  
8 and Walmart refused. Your answer to Question 6 should be "Yes."

9           "Question 7. What sum of money will fairly and  
10:21 10 reasonably compensate Marlo Spaeth for her emotional pain and  
11 mental anguish?"

12           There's no formula for this. You've heard the  
13 evidence. You met Marlo Spaeth. You heard that she still looks  
14 down when there's a Walmart commercial on TV. Even here, six  
10:22 15 years later.

16           Now, there are some cases where there's a small  
17 injury, like a sprained knee from a car, a fender-bender, and  
18 the prevailing plaintiff is awarded a thousand dollars to  
19 compensate that injury. Then there are more serious cases where  
10:22 20 there's loss of life due to illegal actions, and the jury gives  
21 a verdict in the millions.

22           We think this case is somewhere in-between. Walmart  
23 took Marlo's job away from her, but that was also her sense of  
24 purpose, her grounding, organizing part of her routine, her day,  
10:23 25 how she structured her life. It was what she was proud of. It

1 gave her a sense of accomplishment. It gave her a vocation,  
2 it's what she did with her adult years. The evidence you  
3 consider is:

4 The testimony from Amy: "This was a devastating loss  
10:23 5 for Marlo."

6 The testimony from Dr. Smith: "A job loss here led to  
7 depression and anxiety. It even led to memory loss, decline in  
8 memory and brain function." He called it pseudodementia. Marlo  
9 required antidepressant medications before she could stabilize  
10:24 10 from those symptoms. She remains on the antidepressants to this  
11 day.

12 Barb testified she saw Marlo crying when she came home  
13 fired.

14 And you heard Marlo: "I miss Walmart." "I miss  
10:24 15 everybody."

16 She still carries emotional pain and mental anguish.  
17 And it's stable now, it's medicated now, but you also want to  
18 consider the entire timeframe and especially at the time of  
19 termination what that loss meant for Marlo.

10:24 20 What you need to write for the answer for Question 7  
21 is the amount of money that you think will make up for it, the  
22 amount of money that will make up for the emotional pain and the  
23 mental anguish for what Walmart did to Marlo.

24 You know, Marlo gave Walmart 15 years of good work.  
10:25 25 She promoted that 10-foot rule for customer service. She did

1 her job, she did her part. Marlo deserves better than what she  
2 got.

3 "Question 8. What amount, if any, do you award as  
4 punitive damages?"

10:25 5 And here let's go to -- I'll tell you you're going to  
6 need to go to your jury instructions, get your definitions.  
7 Jury Instruction 3.13 is your punitive damages instruction. And  
8 I'm going to need a second to get to it.

9 The purpose of punitive damages is to punish Walmart  
10:26 10 and to serve as an example or a warning to Walmart or others.

11 And remember, Walmart has a million employees. There  
12 are other people that could be -- there are other people that  
13 Walmart employs with disabilities. You're here for Marlo  
14 Spaeth, but let's remember we're talking about Walmart.

10:26 15 The other instruction I want you to look at for  
16 punitive damages as you consider Question 8 on the verdict is  
17 4.08. That's the interactive process. When you look up the  
18 interactive process, Jury Instruction 4.08, you'll see "Where  
19 the need for an accommodation is obvious, the employer must" --  
10:27 20 they must initiate an informal interactive process with the  
21 employee or those acting on behalf -- or acting on the  
22 employee's behalf to determine whether a reasonable  
23 accommodation should provide.

24 It's a duty under the law. The interactive process is  
10:27 25 a must when the accommodation is obvious like it is here.

1 "Where the need for an accommodation is not obvious,  
2 however, the disabled employee, or those acting on the  
3 employee's behalf, must make their employers aware of any  
4 medically necessary accomodation."

10:27 5 Well, that happened, too. We had Marlo explaining  
6 "I'll get sick if I stay this late if I miss supper."

7 We had Amy Jo calling Karen, "She can't handle this."

8 And then later we had Amy Jo in a meeting saying,  
9 "Marlo has a disability. She has a right to an accommodation  
10:28 10 for her disability, plain as day."

11 So Walmart knew they were in this territory where they  
12 must initiate the interactive process.

13 And if you look to the end of that instruction you'll  
14 see "you may consider whether a party cooperated in the  
10:28 15 interactive process when deciding whether a reasonable  
16 accommodation existed and when considering whether to award  
17 punitive damages."

18 So for this you refer to Exhibit 34.

19 Lectrice, can we have Exhibit 34, please?

10:29 20 Walmart must engage in the interactive process?

21 Lee Spude, market research -- market human resource  
22 manager, hears about the termination, hears about the meeting  
23 with Marlo's family, and he instructs Robin Castro: "Do not  
24 have any further discussion with Marlo's relatives."

10:29 25 He knows better. That's the opposite of the

1 interactive process.

2 So the other instruction for punitive damages is 3.13  
3 if Walmart shows reckless disregard in their actions.

4 "An action is in reckless disregard of Marlo Spaeth's  
10:30 5 rights if it's taken with knowledge that it may violate the  
6 law."

7 What we have heard here this week is manager after  
8 manager testifying they know that with the ADA -- because of the  
9 ADA it's illegal to deny a person with a disability a reasonable  
10:30 10 accommodation.

11 And then, further down, in the punitive damages  
12 instructions you see the six factors you're supposed to apply  
13 for punitive damages. It will be on page 19.

14 The reprehensibility of Walmart's conduct;  
10:31 15 The impact of Walmart's conduct on Marlo Spaeth;  
16 The relationship between Marlo Spaeth and Walmart;  
17 The likelihood that Walmart would repeat the conduct  
18 if an award of punitive damages is not made;

19 The relationship of any punitive damages award to the  
10:31 20 actual harm suffered by Marlo Spaeth;

21 And the last factor is Walmart's financial condition.

22 So can we pull up Exhibit 41?

23 If you look when you get to deliberations, you'll see  
24 in Exhibit 41 there's some financial -- there's a financial  
10:31 25 document showing Walmart's total revenues. And I'll tell you,

1 this is reported in the millions. And it's that 485 number?  
2 That's for 2015, the year Walmart took Marlo's job away from her  
3 is a year where Walmart's revenues were 485 billion -- over  
4 \$485 billion.

10:32 5 Thank you.

6 So you need to think about what amount of punitive  
7 damages would serve as a warning to Walmart not to do this  
8 again, not to do this to other employees. Walmart needs to get  
9 the message to follow the law. The amount of money you write  
10:32 10 into Verdict Question No. 8 should be designed to send that  
11 message to Walmart.

12 And at its heart this case is about keeping promises  
13 and doing your part. The right to a reasonable accommodation is  
14 the promise under the Americans With Disabilities Act.

10:33 15 And now it's time for you to do your part. Marlo  
16 Spaeth was fired July 10th, 2015. Here we are, to the week, six  
17 years later. Marlo Spaeth has waited six years. Render the  
18 verdict that brings justice, the verdict that makes up for what  
19 happened to Marlo Spaeth, the verdict that upholds the law.

10:33 20 Thank you.

21 THE COURT: Thank you, Ms. Vance.

22 We're going to take our morning recess and we'll bring  
23 you back out here after 10, 15 minutes to hear further argument.

24 (Jury out at 10:34 a.m.)

10:34 25 THE COURT: We're also going to send menus in to let

1     them choose sandwiches from a sandwich shop so when they're done  
2     hearing arguments they'll have lunch ready and they won't have  
3     to go out in the rain in the middle of deliberations.

4             Anything else to put on the record?

10:34 5             MR. MULHAIRE: We plan to do a rebuttal, but I think  
6     Your Honor knows that already; otherwise, no.

7             THE COURT: Very well. We're in recess.

8             (Recess taken at 10:35 a.m., until 10:51 a.m.)

9             (Jury in at 10:51 a.m.)

10:51 10            THE COURT: Okay. Please be seated, everyone.  
11     Mr. Harlan, you may proceed.

12                             DEFENDANT CLOSING ARGUMENT

13             MR. HARLAN: May it please the Court, Your Honor,  
14     ladies and gentlemen of the jury, counsel, Mr. Burnett,  
10:52 15     Ms. McClone, Warren Buliox who has been part of this case, it's  
16     really an honor to be able to talk to you all this morning.

17             This case is about Walmart; but, more particularly,  
18     it's about individual managers at Walmart who have been  
19     disparaged in this case. And that's why this is a very  
10:52 20     important case for Walmart. It's important to stand up for  
21     people who are unfairly attacked for having supposedly violated  
22     the law when they have done nothing of the sort and work to be  
23     very fair and honest and diligent in working with one of their  
24     people. And that's what the evidence showed in this case.

10:53 25             So if you all have a problem with PowerPoint you're



1 going to have a problem with me, unfortunately, because that's  
2 what I plan to do today. And I'm going to ask for your patience  
3 because it's going to -- I want to present a fair amount of the  
4 evidence to you so that you can consider it in your  
10:53 5 deliberations. So I apologize in advance if I go a little bit  
6 long, but I only have one chance to talk with you. When I sit  
7 down Ms. Vance will get back up and have an additional  
8 opportunity to speak with you, but I won't, and that's the rules  
9 that we have to follow.

10:53 10 Before we get into the presentation I do want to  
11 acknowledge the judge. Judge Griesbach has had a very  
12 distinguished career. I'm sure you all have had some  
13 interaction with him throughout the case. Very fair person,  
14 very reasonable. It has been a pleasure to be in this court to  
10:54 15 try this case in front of him.

16 So let's get to it. I know this is called closing  
17 arguments, but one thing that we can agree on, I'm not going to  
18 be arguing with you. I just want to talk to you about what the  
19 evidence has shown in the case and why the evidence does not  
10:54 20 support any of the EEOC's claims.

21 So here's a little brief review of what I'm going to  
22 be covering with you. I'm going to talk about some of the  
23 testimony that we heard. Just like Ms. Vance, I'm going to talk  
24 about some of the key definitions in Judge Griesbach's  
10:54 25 instructions; why the EEOC has failed to prove any of its claims

1 in this case; the fact that there are absolutely no damages; and  
2 respond to some of the points that you heard from Ms. Vance and  
3 you heard throughout the trial. And then I want to talk about a  
4 gentleman named Raymond Donovan. It's not the guy on TV who has  
10:55 5 a TV show, it's a different Raymond Donovan.

6 Karen Becker. She was one of the earliest witnesses  
7 in the case. No longer works at Walmart. Has no connection  
8 whatsoever to Walmart.

9 You heard her personal background, her commitment to  
10:55 10 working with individuals with disabilities. Worked to  
11 accommodate Ms. Spaeth.

12 You heard that she would print out her schedule, write  
13 out her schedule on a weekly basis. There's no evidence that  
14 she did that for anybody else at the Manitowoc store. Didn't  
10:55 15 have to do it, but she did it. She thought it was important to  
16 do that to make sure Ms. Spaeth understood her schedule.

17 She said that Ms. Spaeth was very capable during the  
18 time that she was at Walmart. Much higher capabilities than  
19 Ms. Vance seemed to suggest, and even Ms. Spaeth's sister, Amy  
10:56 20 Jo Stevenson, and certainly more than what Dr. Smith claims.  
21 We're going to talk about Dr. Smith in a moment. He said she  
22 couldn't even read.

23 And, of course, you heard from the person that knows  
24 her best, Barbara Barnes, who said they read the newspaper every  
10:56 25 day and talk about what they read.

1           There was this idea that Walmart had some obligation  
2   to call Ms. Spaeth's mother. That was never the relationship  
3   between Walmart and Ms. Spaeth's mother when she was living. It  
4   was the other way around. When there were things that  
10:56 5   Ms. Spaeth's mother wanted to communicate, she would get in  
6   contact with Ms. Becker. That's what Ms. Becker said.

7           There's also I think you heard testimony throughout  
8   the trial that there was an occasion where Julia Stern was  
9   talking with Ms. Spaeth and about her attendance and working her  
10:57 10   schedule, and then she looked up and Ms. Spaeth was headed home  
11   and Ms. Spaeth said, well, you know, Karen said that I could  
12   leave. Well, she happened to talk to Ms. Becker and Ms. Becker  
13   said, well, no, I didn't say that. Ms. Spaeth was fibbing.

14           The reality is Ms. Becker had no authority to send  
10:57 15   anybody home. She was a non-salaried manager. That wasn't part  
16   of her responsibility or authority within the company.

17           No knowledge of Ms. Spaeth being mistreated. And this  
18   is a very important point. Ms. Vance referenced it. They are  
19   really tied to the hip with Amy Jo Stevenson. She's the one  
10:57 20   that initiated all this.

21           Amy Jo Stevenson said she called Karen Becker and said  
22   my sister needs an accommodation because of the schedule change.  
23   Ms. Becker sat in that box and told you that call never  
24   happened. Not I can't recall, maybe, what timeframe -- no, it  
10:58 25   never happened. That's what she said.

1 Now, Ms. Becker has really no skin in the game; right?  
2 She doesn't work for Walmart. She's gone. And this outcome is  
3 not going to really impact her one way or the other. Certainly  
4 not going to impact her job because she doesn't work for Walmart  
10:58 5 anymore.

6 How about Ms. Stevenson? Does she have skin in the  
7 game? She absolutely has skin in the game. You heard during  
8 her testimony that she's the trustee for some trust that's been  
9 set up for Marlo Spaeth. She controls her money. Any money she  
10:58 10 gets in connection with litigation Ms. Stevenson is going to  
11 have control over. She's the trustee. She's the legal guardian  
12 at this point.

13 So I think one of the things you're going to have to  
14 grapple with is what to make of what Amy Jo Stevenson has told  
10:59 15 you and what she has been doing. That's a key aspect of this  
16 case.

17 That's a picture of Amy Jo Stevenson from her  
18 deposition in the case. You obviously heard from her. Let's  
19 talk about some of the things about Ms. Stevenson.

10:59 20 She frankly has not been candid or truthful in her  
21 dealings with Walmart or in this case.

22 First, she wasn't candid about being Ms. Spaeth's  
23 guardian, at all. She told Walmart management back in 2015 that  
24 she was the guardian when, in fact, she wasn't a guardian. She  
10:59 25 told the EEOC she was a guardian in 2016. She wasn't -- that's

1 a completely different story than she told the people at  
2 Walmart. She wasn't even the first standby guardian. She was  
3 in the second position.

4 She didn't become the legal guardian until 2018. And  
11:00 5 how do we know that? Here's an exhibit that you will have  
6 access to, 1040, that shows it was on January 24th, 2018 that  
7 there was an order entered making Ms. Stevenson the guardian.

8 Here's a typewritten interview from an interview  
9 conducted by the EEOC in this case. There was a question asked  
11:00 10 at that interview:

11 "Ms. Stevenson, how long have you been Marlo's  
12 guardian?

13 "June 16, 2016."

14 That's when she told the EEOC she was first the  
11:00 15 guardian. But she was at a meeting with Walmart management  
16 after Ms. Spaeth was terminated saying she was the guardian.  
17 That was in 2015.

18 She also misrepresented facts about Ms. Spaeth's  
19 employment when she filed a complaint with the Department of  
11:01 20 Justice. Before she went to the EEOC, she filed a complaint  
21 document with the Department of Justice. In that document she  
22 said Marlo had always worked Monday through Friday, noon to  
23 4:00, except Thursday.

24 Now, you obviously have seen the records. She wasn't  
11:01 25 supposed to work Thursday, that wasn't on her availability, but

1 for several years she worked on Thursdays, consistently. But  
2 yet she's telling the Department of Justice that's not what her  
3 schedule was. So either she didn't have a firm handle on what  
4 was going on with the person that she's supposed to be caring  
11:01 5 for, or she was just misrepresenting the facts, willing to say  
6 anything.

7 You heard Dr. Smith in his testimony say that, well,  
8 Ms. Spaeth really doesn't have dementia. He I think prescribed  
9 some medication, Amy Jo Stevenson, he relied on what she told  
11:02 10 him, said that her memory has substantially improved. So  
11 somebody's not telling the truth in that account.

12 Here's some documents that Ms. Stevenson filed with  
13 the court. This is a document, on the left, Trial Exhibit 1041.  
14 This was filed in 2017 by Ms. Stevenson. And what does she say?

11:02 15 "Dementia has set in and is progressing."

16 That's what she told the court. But she's here saying  
17 that she doesn't have dementia.

18 Then, on February 22nd, 2019 -- actually I guess she  
19 signed it on the 13th of 2019. Here's another form that she  
11:03 20 filed with the court. She says, "Worsened. Her health  
21 condition has worsened. Signs of dementia." But she's here  
22 saying she doesn't have dementia.

23 She came to the termination meeting and played the  
24 disability card. Threatened to sue these people. So Ms. Vance  
11:03 25 is saying Lee Spude directed managers not to call her. Who

1 would want -- what HR person would want their management calling  
2 somebody -- they're not lawyers -- when there's been a threat of  
3 litigation? She didn't have any authority really to be talking  
4 to them. This involved Marlo Spaeth. She hadn't presented  
11:03 5 Walmart with any documentation showing that she had the  
6 authority to speak on behalf of Ms. Spaeth.

7 She was focused on cashing in, not helping Ms. Spaeth.  
8 Otherwise, as interested as Ms. Spaeth has indicated and the  
9 evidence that's come in that she wants to go back to work, she  
11:04 10 misses Walmart, she would have helped her reapply for a position  
11 there.

12 You saw the evidences. There have been a number of  
13 individuals who have been terminated for attendance, they wait  
14 the requisite time, they put in the application and they've been  
11:04 15 rehired.

16 She claims that she got a call from Ms. Castro and  
17 said that she wouldn't be rehired, Ms. Spaeth did. But the  
18 context of that call was in response to whether she's going to  
19 be put right back to work then. And they don't reinstate people  
11:04 20 with Walmart unless they find out that there was something wrong  
21 in terms of how they calculated the attendance occurrences or  
22 that there was something wrong with the process.

23 We talked about her being the trustee for the special  
24 needs trust. She testified here in front of you about the fact  
11:05 25 that Ms. Spaeth has the ability to adapt to a new routine if you

1 do this hand-holding process with her, but there's no evidence  
2 that she helped Ms. Spaeth try to adapt to her new schedule.  
3 And certainly there's no evidence that she shared any of that  
4 information with the folks at Walmart.

11:05 5 This is her sister. And if she knew that she had this  
6 difficulty with adapting to new routines or having her routine  
7 interrupted, why wouldn't she have shared that information with  
8 the folks at Walmart, if she's trying to really do something  
9 beneficial for her sister?

11:05 10 Then you heard the testimony from Barbara Barnes. I  
11 had to bring it out because I obviously had taken her  
12 deposition.

13 Now, Ms. Stevenson had been told "we won't talk to  
14 you, we'll talk to your sister. She's the employee, she's the  
11:06 15 associate." They told her when the phone call was going to come  
16 to Ms. Spaeth. So what does Ms. Stevenson do? First of all,  
17 she doesn't go over there to be with her sister when she  
18 receives this phone call. She calls up and says, "Hey, Barbara,  
19 I want you to go and pick up the line in the other room and  
11:06 20 listen in on that conversation and make sure you don't make  
21 Walmart aware that you're on that other line."

22 That is a interesting window into what Amy Jo  
23 Stevenson is; the fact that she would do something like that  
24 knowing that that's improper, knowing that the phone call is  
11:06 25 supposed to be between Walmart and Marlo Spaeth, to have



1 somebody else listening in on the phone call and directing them  
2 to keep it secret, to basically eavesdrop.

3           Testified that Ms. Spaeth was depressed and  
4 inconsolable following the termination. Do you remember what  
11:07 5 Ms. Barnes said? She said when she came home she was crying.  
6 She helped console her. And after about 30 minutes it was like  
7 back to normal. Watched TV, had supper, went to bed. Didn't  
8 stay up crying.

9           And then she talked about what her life has been after  
11:07 10 Walmart. It's been completely happy, no health problems, not in  
11 the throes of some depression. But that completely contradicts  
12 what Amy Jo says.

13           Then, interestingly, we have a chart here to show you  
14 something about the evolution of Ms. Stevenson's explanation  
11:07 15 about this groove that Dr. Smith talked about.

16           So we know that there was a posttermination meeting on  
17 July 16, 2015, and at that meeting nobody recounts Ms. Stevenson  
18 saying anything about the groove or some inability to adapt to  
19 routine. That did not come up anywhere. All she did was go to  
11:08 20 that meeting and say my sister needs to be put back on the  
21 days -- on the hours that she wants to work and if you don't do  
22 it, I'm going to sue you. That's all she said.

23           Then we see the DOJ complaint, the Department of  
24 Justice complaint that she filed. Didn't mention anything about  
11:08 25 the fact that her sister has some sort of need for routine and

1 that's why her employment was terminated. Didn't mention that  
2 at all.

3 Then the thing that started this case is a charge of  
4 discrimination with the EEOC. She filed a charge. Didn't  
11:09 5 mention anything about this difficulty dealing with routine or  
6 groove. Nothing like that was mentioned. And, of course,  
7 Dr. Smith wasn't on the scene at that point.

8 And then there's again the interview that she had with  
9 the EEOC. That's Exhibit 1065 that you will have. Nothing in  
11:09 10 that interview about Ms. Spaeth having some sort of need for a  
11 consistent routine, and that when there are interruptions in her  
12 routine that she faces difficulty. Nothing about that.

13 And then Dr. Smith comes along. He hears about this  
14 lawsuit and calls up the EEOC and says I'm your guy. And he  
11:09 15 comes up with this theory called the groove; that the reason  
16 that Ms. Spaeth hasn't been able to follow her schedule is  
17 because people with Down syndrome have this resistance to change  
18 and when you change their habits, their routine, it throws them  
19 out of whack.

11:10 20 That's essentially what he testified to. And then, of  
21 course, we get to trial -- we get to trial and we hear  
22 Ms. Stevenson say pretty much the same thing, basically  
23 parroting what Dr. Smith said, that she's known that she's had  
24 this characteristic her whole life, and it's just frankly not  
11:10 25 credible.

1 Ms. Stevenson pointed the finger at Walmart. And I'm  
2 sure you all have heard the expression be careful about pointing  
3 the finger at somebody because there are three that point back  
4 at you. And that's particularly appropriate in this situation.

11:10 5 Let's look at Amy Jo Stevenson.

6 Failed to make sure that Ms. Spaeth was complying with  
7 her new schedule.

8 You heard the testimony that Ms. Spaeth had told her  
9 sister about the change in schedule. If Ms. Stevenson, as she  
11:11 10 maintains, knows that a change in her schedule is going to  
11 create problems for her, why didn't she do anything about it?  
12 Why didn't she call the company and say, hey, you need to know  
13 about this issue in dealing with my sister?

14 And she says that she called Ms. Becker. She says she  
11:11 15 called her once. I think the testimony was it was like maybe  
16 three or four months before her termination. No evidence  
17 whatsoever that she called and checked on her sister's  
18 situation; that she sent an email, sent a letter.

19 And you heard testimony from Barbara Barnes. The EEOC  
11:11 20 didn't bring it out. We just wanted to give you a sense that  
21 Ms. Stevenson is a sophisticated individual. She's a business  
22 woman. And so if this was something that she knew was going to  
23 be devastating for her sister that she had her schedule changed,  
24 why wouldn't she at least send an email? How much effort does  
11:12 25 it take to find out her manager's email address and just send a

1 little note saying, hey, you need to understand that this  
2 schedule change is going to be problematic for my sister and I  
3 want you to keep me abreast if there are problems so that I can  
4 intervene.

11:12 5 Took no steps to replace her mother as the guardian.  
6 Most significantly, didn't help her sister look for work. You  
7 heard I think Ms. Spaeth when she came and testified about how  
8 much she liked Walmart, she liked the people there. You heard  
9 Kent Abitz say they have positions all the time, they can't find  
11:12 10 enough people.

11 You can apply for a position at Walmart at the kitchen  
12 table. You don't have to go to the store. And incredibly, does  
13 it make sense to you that Barbara Barnes, Ms. Spaeth's  
14 stepsister, would be invited over to Ms. Stevenson's house and  
11:13 15 Ms. Stevenson would help Barbara Barnes apply for a position at  
16 Walmart and wouldn't help her own sister? And she was over  
17 there with Ms. Barnes.

18 So I think perhaps Ms. Stevenson believes that this  
19 somehow will increase the money that she can get on behalf of  
11:13 20 Ms. Spaeth by keeping her out of the workforce. You saw  
21 Ms. Spaeth. She was able to get up on that witness stand and  
22 talk. She listened to questions, she had the ability to  
23 communicate. She's employable. Why hasn't she worked? Why  
24 hasn't she tried to help her get back into the workforce?

11:13 25 She also claimed in her trial testimony that she

1 handles all of Ms. Spaeth's medical appointments. But here we  
2 have, at Exhibit 1049, a medical record that says Marlo is here,  
3 her sister set up the appointment, but she's not there with her  
4 today. She's left Marlo to be at that appointment navigating  
11:14 5 her own health situation. But she told you that she's at all  
6 her medical appointments.

7 Barbara Barnes. I imagine you all were surprised when  
8 the EEOC didn't call the person as a witness who was the closest  
9 person to Marlo Spaeth in the world. That's been her roommate  
11:14 10 for 15 years, they love each other, have a tremendous  
11 relationship. So if the EEOC wanted you to understand how Marlo  
12 Spaeth is doing, wouldn't you expect them to put the person who  
13 is the closest to her that knows her intimately on that witness  
14 stand and bring out that testimony?

11:15 15 They didn't do that. We had to call her as part of  
16 our case. We had to subpoena her to bring her to court. And  
17 once she got on that witness stand I think you had a sense of  
18 why the EEOC didn't call her, because she completely undermined  
19 what Dr. Smith had to say and what Amy Jo Stevenson said about  
11:15 20 how devastated Marlo Spaeth has been.

21 When Marlo Spaeth's schedule was changed, what did  
22 Barbara Barnes tell you? Yeah, she came home a little later,  
23 but it was just like it always was. She wasn't sent into some  
24 kind of bewilderment, confused. She had the same life that she  
11:15 25 had before the schedule changed.

1           You also heard that Ms. Barnes and Ms. Spaeth had a  
2 little run-in about the fact that Ms. Spaeth had to work later.  
3 They were accustomed to having supper at a certain time. And  
4 because Ms. Spaeth's hours changed, she let Ms. Spaeth know I'm  
11:16 5 not really happy that I gotta wait around for you to come home  
6 and eat. Might that account for why Ms. Spaeth wanted to get  
7 home? I suspect it had something to do with it. It's not Down  
8 syndrome, it's the fact that had her roommate was ticked off at  
9 her because that she was having to wait around for her to eat  
11:16 10 dinner. It has nothing to do with Down syndrome.

11           And incredibly, Barbara Barnes told you that she was  
12 at the physical examination, the medical examination. I call it  
13 the drive-by examination because Dr. Smith really did that just  
14 because he knew that he had to at least see her. But he saw her  
11:16 15 for a half hour. And in just a half hour he was able to figure  
16 out that her schedule caused the difficulties that she had and  
17 figured out that she's suffering from depression, all in a half  
18 hour.

19           But, incredibly, even though Barbara Barnes was at  
11:17 20 that appointment, she's the person that knows Ms. Spaeth the  
21 best, he didn't even bother to stick his head out of the room  
22 and ask to speak to her for five minutes. Instead, he chose to  
23 get his information about Marlo Spaeth from someone who has an  
24 interest in this case, the person who created this litigation,  
11:17 25 and that's Amy Jo Stevenson. And she is the one that fed him

1 all the information that he relied upon. I think he asked  
2 Ms. Spaeth a couple of questions. 99 percent of everything that  
3 he got was from Amy Jo. Oh, Marlo is depressed and she's having  
4 difficulties. That's what he got from Ms. Stevenson.

11:18 5 Lee Spude. You remember him. He's the rapid-fire  
6 guy. Unfortunately he was -- I hope I'm not doing it, but he  
7 was giving the court reporter a difficult time trying to keep up  
8 with him. But he certainly had a command of the policies and  
9 procedures at Walmart. Never construed anything Amy Jo  
11:18 10 Stevenson was saying as some sort of request for accommodation  
11 that Ms. Spaeth needed. She was basically threatening to sue  
12 the company. That's what his testimony was.

13 Kent Abitz. He's the person who was a store manager  
14 at the Manitowoc store. He led the investigation after  
11:18 15 Ms. Stevenson raised the allegations.

16 As part of that investigation he looked at the  
17 attendance history. I'm sure you've seen it. Now, the theory  
18 EEOC's case is, hey, this schedule change in November of 2014  
19 threw Ms. Spaeth off. She was used to working noon to 4:00.

11:19 20 What did Mr. Abitz say? He looked at her attendance  
21 history and found that she was leaving work early many, many  
22 months and years prior to her schedule change. So how does that  
23 indicate to Walmart that it must be the schedule change and some  
24 linkage or connection to Down syndrome? This has been a  
11:19 25 long-running practice.

1 Now, Ms. Vance wants you to look at these evaluations  
2 that show that she has zero tardies and zero absences. Well,  
3 what was most of the case about? It was leaving early. An  
4 absence isn't leaving early. That's a different issue.

11:20 5 Most of her attendance violations, the vast majority  
6 were about leaving early. And then even on those evaluations,  
7 you know based on what you know about Walmart's attendance  
8 policy, after a six-month period those violations start to roll  
9 off.

11:20 10 Bonnie Popp. She came here and gave emotional  
11 testimony. She was somebody that really liked Marlo Spaeth.  
12 She worked with her to learn new tasks. And she also told you  
13 at that meeting she was offended by Amy Jo Stevenson's  
14 characterization of her sister as, quote-unquote, different.

11:20 15 You had a chance to size up Bonnie Popp. She came  
16 here and was honest and candid and had no idea that any of the  
17 discussions with Marlo Spaeth had anything to do with a need for  
18 a reasonable accommodation.

11:21 19 Robin Castro. Wasn't her best day. Being in federal  
20 court is a difficult thing for lots of folks. Clearly nervous.  
21 You saw her on the witness stand. Had some challenges. But  
22 ultimately confirmed that she didn't believe that there was any  
23 kind of a request for a reasonable accommodation. And even if  
24 she did believe that that was the case, she's one person.

11:21 25 The folks at Walmart who testified here have been



1 consistent about what they understood the situation with  
2 Ms. Spaeth to be; that she had a preference for a particular  
3 time because that's what she wanted, it wasn't what she needed.

4 At no point was there any sort of documentation,  
11:21 5 medical or otherwise, substantiating that she needed to work  
6 noon to 4:00 because of some feature of Down syndrome. That's  
7 after the fact, Dr. Smith-driven, litigation-driven expert  
8 opinion. And you'll have to make -- since the EEOC claims that  
9 Ms. Spaeth's comments about needing to get home because she  
11:22 10 might get sick if she doesn't eat, if you believe that that's an  
11 obvious indication that you have a need for an accommodation, I  
12 frankly think that's ridiculous.

13 Those statements were vague, don't suggest that it has  
14 anything to do with her Down syndrome, the fact that she wanted  
11:22 15 to be home because she might be sick. Lots of people state all  
16 the time that if they don't eat at a certain time that they  
17 might pass out or get dizzy. That's not an indication that  
18 there is something about Down syndrome that's inhibiting her  
19 ability to work the shifts that she's been scheduled.

11:23 20 Marlo Spaeth. She absolutely demonstrated that she  
21 had the ability to understand what was being communicated. She  
22 testified in this case, acknowledged telling Amy Jo Stevenson  
23 that her schedule had changed, and certainly no indication that  
24 she's suffering from depression or any ill effects from having  
11:23 25 lost her position at Walmart.

1           If you were to look up the definition of "biased,"  
2     Dr. Smith would be -- his picture would be there. He came to  
3     this case with an agenda. Before he knew anything about Walmart  
4     and what their actions had been in connection with Ms. Spaeth,  
11:23 5     he had reached his conclusion that this groove thing is why  
6     Ms. Spaeth had these attendance issues. That's what he came to  
7     the table with. He's like a hammer in search of nails. He has  
8     this great theory that's his theory about what features  
9     individuals with Down syndrome have, and he wants to apply it in  
11:24 10    every situation.

11           He conducted his work through the lens of somebody  
12    who's an advocate for people with Down syndrome. He's a  
13    competent medical doctor. He's an advocate for people with Down  
14    syndrome. Spent just a half hour looking at Ms. Spaeth and  
11:24 15    treating her. Reviewed only a portion of her medical records  
16    before reaching almost all the opinions that he testified to in  
17    this case. Didn't bother to speak to Ms. Barnes.

18           He relied almost exclusively on what Amy Jo Stevenson  
19    was telling him about Ms. Spaeth's situation, and we know that  
11:25 20    that's a problem. He had one phone call with Ms. Spaeth's  
21    regular medical provider.

22           And, most significantly, he had no explanation for how  
23    he could eliminate the possibility that Ms. Spaeth just simply  
24    wanted to work noon to 4:00 because she preferred that time as  
11:25 25    opposed to being unable to work a different shift because of her

1 Down syndrome condition. He didn't even ask Ms. Spaeth what her  
2 schedule preference was. That's what he testified to in this  
3 case.

4 He wasn't here to provide objective medical evidence  
11:25 5 that you should rely upon. He had an agenda, which is he wanted  
6 to help somebody with this theory that he has and try to help  
7 her win a case given her status as a individual with Down  
8 syndrome.

9 He also completely ignored the evidence that before  
11:26 10 her schedule changed to 1:00 to 5:30 she wasn't completing her  
11 shifts when she was working noon to 4:00. So how is it that the  
12 schedule change is a cause of her having the inability to  
13 complete shifts?

14 Also, how can you indicate that Ms. Spaeth has a need  
11:26 15 for routine and an interruption with her routine has caused her  
16 all these problems when did you see her schedule for the last  
17 two or three years that she was at Walmart? Week to week she's  
18 working different days. One day she's working Monday, next week  
19 she's working Monday, Tuesday, and Wednesday. She's working,  
11:26 20 you know, Friday on some weeks. Her schedule was all over the  
21 place. That's not a routine.

22 And this groove theory that Dr. Smith talked to you  
23 about that he championed, not something that's been  
24 peer-reviewed. Peer review is the process of experts looking at  
11:27 25 other experts' work, ripping it apart, subjecting it to

1 scrutiny, and then determining that it has validity.

2 Julia Stern. She's been a person who has been  
3 disparaged throughout this litigation. But what you heard from  
4 Ms. Stern is she didn't have any bias against Ms. Spaeth. She  
11:27 5 went beyond the call of duty to try to get Ms. Spaeth to comply  
6 with the company's policies. Showed her extreme leniency. Had  
7 numerous discussions with her. Worked with her to expand her  
8 duties.

9 Sometimes I think there are people who believe that  
11:27 10 the disabled aren't capable of doing things. That wasn't  
11 Ms. Stern. She believed that Ms. Spaeth had the capacity to do  
12 more than she was doing. She was not, when Ms. Stern took over,  
13 doing the full components of her position, and she worked with  
14 her to expand it. And we know she wasn't picking on her because  
11:28 15 we showed you evaluations that other managers had done where  
16 they made the same observations that it's great that Ms. Spaeth  
17 is able to fold towels and rugs, but she needs to work on other  
18 areas of her department, and that's what Ms. Stern helped her to  
19 do.

11:28 20 Most significantly, she also told you that she's  
21 terminated numerous people for attendance violations. She's not  
22 only dealing with Ms. Spaeth. She told you one month before  
23 Ms. Spaeth was let go she terminated somebody in the Manitowoc  
24 store for attendance. One month after Ms. Spaeth was let go she  
11:28 25 terminated somebody. Two months later she terminated another

1 person. This is all in 2015. That's not bias, that's  
2 consistency. The company has an attendance policy and people  
3 get terminated when they don't follow it.

4 She also told you she had no idea, no indication that  
11:29 5 this schedule preference that Ms. Spaeth was continuing to raise  
6 in meetings had anything to do with Down syndrome or some sort  
7 of request for accommodation.

8 I'm just going to briefly go over some of the key  
9 definitions from Judge Griesbach's instructions.

11:29 10 Qualified. One of the first questions that you're  
11 going to have to address is whether Ms. Spaeth is a qualified  
12 individual.

13 We're not arguing that she didn't have the ability to  
14 do the job in terms of the day-to-day tasks as a sales  
11:29 15 associate. She was rated well at the company. She definitely  
16 had the capacity, the ability at the time of her termination to  
17 do that. But what's very clear is she didn't have the ability  
18 to follow the company's attendance policy. She continued to  
19 violate the company's attendance policy and that's what led to  
11:30 20 her discharge.

21 You also need to be flexible. The idea that Walmart  
22 is going to give somebody a permanent fixed schedule is not  
23 something that they do. If she needed that, she wasn't  
24 qualified for her position at Walmart. And so when you look at  
11:30 25 that first question, think about the fact that Walmart has an

1 attendance policy as the instruction says. In addition to  
2 specific job requirements, the company can require regular and  
3 timely attendance.

4 Reasonable accommodation. Reasonable accommodation is  
11:30 5 not something that an associate necessarily suggests. Just  
6 because an associate wants a particular accommodation doesn't  
7 make it reasonable. It's what will enable the associate to do  
8 the job. And it doesn't include eliminating essential functions  
9 and duties of the position.

11:31 10 The EEOC has failed to prove any of its claims in this  
11 case. For their reasonable accommodation claim they have to  
12 show that Ms. Spaeth is a qualified individual with a  
13 disability. Walmart had to be aware that Ms. Spaeth needed an  
14 accommodation due to her disability and they have to show that  
11:31 15 Walmart didn't give her a reasonable accommodation.

16 The judge has also instructed you that when the need  
17 for an accommodation is not obvious, the disabled employee or  
18 those acting on the employee's behalf must make their employers  
19 aware of any medically necessary accommodation.

11:32 20 And the one thing you didn't hear in this case was any  
21 evidence that Ms. Spaeth, or anyone on her behalf, provided  
22 Walmart with any indication, through documents or otherwise,  
23 that she had a medical need for a fixed schedule of noon to  
24 4:00. Zero evidence of that. And I would ask you that you take  
11:32 25 a look at that instruction and consider that as you think about

1 whether Walmart violated its duty to provide her with a  
2 reasonable accommodation.

3 Ms. Spaeth wasn't qualified. So these are the reasons  
4 that the EEOC has failed to make the showing necessary to  
11:32 5 prevail on their claim. She wasn't qualified at the time of her  
6 termination.

7 No evidence that Walmart was aware that there was a  
8 need to provide a accommodation of Ms. Spaeth. In fact, she  
9 didn't need an accommodation. She had a schedule preference  
11:33 10 based on what she wanted.

11 And then they also have failed to indicate or show  
12 that we failed to provide her with an accommodation. The  
13 reality is that we worked with Ms. Spaeth for a seven-month  
14 period to try to get her to comply with the company's policy.

11:33 15 I mentioned before that the records will show that she  
16 had this diverse attendance pattern -- I'm sorry, schedule, and  
17 these next three slides show that.

18 In 2012, look at the days of the week that she was  
19 scheduled.

11:33 20 2013. Week to week she's working different days.

21 2014. Same.

22 The idea that she needed some sort of routine to be  
23 able to do her job is completely undermined by what her weekly  
24 schedule was week to week at Walmart.

11:34 25 The EEOC's whole case is based on trying to downplay

1 what Ms. Spaeth's capabilities are, but her evaluation shows she  
2 was quite capable. She got good ratings. Her mother thought  
3 she was capable, too. And you obviously saw Ms. Spaeth testify  
4 here.

11:34 5 This is an interesting exhibit I would encourage you  
6 to look at. It's again part of the medical records, 1050. So  
7 Ms. Spaeth went to get a mammogram. And this is when her mother  
8 was still living. And her mother communicated with the hospital  
9 that, hey, my daughter has Down syndrome, but she's very capable  
11:34 10 of understanding results so feel free to reach out and contact  
11 her directly.

12 Something like a mammogram? That's a very serious  
13 thing. And Ms. Spaeth's mother, who knows her well, is saying  
14 she is fully capable of understanding that information and  
11:35 15 processing that information. That doesn't sound to me like  
16 someone who doesn't have the requisite cognitive abilities to  
17 understand what she's supposed to be doing in terms of her work  
18 schedule.

19 So based upon what the evidence has shown in this case  
11:35 20 I think the answer to these questions should be "No."

21 "Question 1. Was she a qualified person with a  
22 disability?"

23 "Was Walmart aware that she needed a accommodation due  
24 to her disability?"

11:35 25 "No."



1 And did Walmart fail to provide her with a reasonable  
2 accommodation?

3 "No."

4 Discriminatory discharge. The judge has given you  
11:36 5 instructions in terms of elements there. Again, she has to  
6 be -- in order for the EEOC to prevail in this claim they have  
7 to prove -- they have the burden of proof and they have to prove  
8 that she was qualified at the time of her termination.

9 No dispute that she was discharged. The real issue  
11:36 10 is, in addition to the qualification issue, is whether she was  
11 discharged because of her disability, but everything else  
12 remained the same. In other words, they have to show because of  
13 her disability that she was discharged. And there's absolutely  
14 no evidence of that.

11:36 15 You heard extensive evidence from the folks at Walmart  
16 about how they worked with her, how they tried to get her to  
17 comply, how Karen Becker wrote out her schedule week to week,  
18 how they worked with Ms. Spaeth to teach her different things.  
19 If they wanted to get rid of Ms. Spaeth, they could have  
11:37 20 terminated her employment many, many months before they did. If  
21 they wanted to get rid of Ms. Spaeth and not have anything to do  
22 with her, why would they work to change her availability form?  
23 The computer was spitting out schedules that they had to follow  
24 that her availability didn't allow her to work. If you didn't  
11:37 25 want to have anything to do with her why would you work to

1 change her availability so that she could get hours? If they  
2 didn't do anything she would get no work.

3 They had no issue with Ms. Spaeth because of her  
4 disability. You didn't hear any evidence of comments or anybody  
11:37 5 poking fun of her or anything else. Just the opposite. Her  
6 colleagues enjoyed working with her and obviously she enjoyed  
7 working with them.

8 So I think the answer to Question 5, whether Walmart  
9 violated the ADA by terminating her because of her disability,  
11:38 10 is clearly "No."

11 Then the third claim that the EEOC has is a failure to  
12 reinstate; that they didn't give Ms. Spaeth her job back because  
13 her sister came in and threatened to sue them.

14 So if you look at the elements here, somebody asked  
11:38 15 for reinstatement.

16 That she was qualified at that point in time. Again,  
17 we've talked about that. She wasn't qualified because she  
18 couldn't follow the attendance policy.

19 And that they didn't reinstate her because of her Down  
11:38 20 syndrome or need for reasonable accommodations.

21 There's no evidence that her failure to get her job  
22 back had anything to do with her disability. None at all. The  
23 reality is, Walmart does have a system where individuals can be  
24 reinstated if there is some sort of mistake or problem  
11:39 25 associated with the action. But they investigated and found

1 that there was no basis to reinstate her.

2 And, of course, you can reapply for your position, and  
3 Ms. Spaeth never reapplied. Her sister never helped her submit  
4 an application. That's for you to determine, how does that make  
11:39 5 sense for somebody who wants to come back and work.

6 So I think the answer to Question 6 is clearly "No."

7 There are also no damages in this case. And how do we  
8 know that? Barbara Barnes told you. Within 30 minutes of her  
9 getting home and after crying initially, she was back to normal.  
11:39 10 What's her life been like after her termination? She's had an  
11 active life. She's into bowling, she's into bocce ball, Special  
12 Olympics. Unfortunately because of COVID they apparently  
13 stopped exercising, but they exercised several times a week.  
14 They would go together.

11:40 15 Medical records show no record of depression shortly  
16 after her termination. It was only after Ms. Stevenson decided  
17 to bring this lawsuit or go to the EEOC and get them to bring  
18 the lawsuit that there became references in the medical records  
19 to depression.

11:40 20 Dr. Smith's opinions about depression are absurd. He  
21 spent a half hour with her. If he really thought she had a  
22 depression problem, why didn't he send her to a psychiatrist?  
23 He's not a psychiatrist, he's a medical doctor, and he's now a  
24 retired medical doctor. And whatever opinions he has about  
11:40 25 whether she has depression is 100 percent based upon talking to

1 Amy Jo Stevenson. 100 percent.

2 Just want to show you a couple of medical records.  
3 You look at Exhibit 1049. Earlier this year she had a medical  
4 examination and this is how Amy Jo or Ms. Spaeth responded in  
11:41 5 terms of whether she has depression.

6 "Not at all. Zero. Not at all. Not difficult at  
7 all. Zero."

8 She had an initial depression screening in 2017, not  
9 too long after she was let go. Exhibit 1049. "Feeling down,  
11:41 10 not at all. Little interest, pleasure in activities? Not at  
11 all. Zero initial depression score."

12 Then we see some other interesting notes in the  
13 medical records where -- based on what Amy Jo is telling the  
14 medical providers that she lost her job due to memory loss and  
11:42 15 that she's suing Walmart. Why is she in a doctor's appointment  
16 talking about suing Walmart?

17 No new concerns. If you look at the record in 2016.  
18 She's reporting no new concerns. But yet Ms. Stevenson is  
19 talking about how devastated Ms. Spaeth has been because she's  
11:42 20 not working at Walmart. That doesn't make sense.

21 Ms. Vance also talked to you about punitive damages.  
22 There's absolutely no basis for punitive damages of any sort in  
23 this case. Walmart worked very diligently to help Ms. Spaeth.  
24 They exercised tremendous discretion and leniency with her.  
11:42 25 They hired her, they gave her an opportunity at Walmart.

1 When she came to Walmart there was an implicit  
2 understanding that, hey, we're going to provide you with an  
3 employment opportunity, but you have to do your part and adhere  
4 to our policies and rules. And that worked well.

11:43 5 But you heard ample evidence from Walmart that the  
6 attendance policy is something that they take seriously. You  
7 can't do folding towels, folding rugs if you're not at work.  
8 And Walmart has a right to run its business in a way that it  
9 makes sense that's reasonable, and to expect associates who work  
11:43 10 for them to work the schedules that they are assigned.

11 There's no recklessness associated with that. There's  
12 no evidence whatsoever that Walmart knew that Ms. Spaeth needed  
13 some accommodation and ignored it.

14 The company also provides extensive training to its  
11:43 15 associates to help them understand what their obligations are.  
16 They have a whole department that deals with accommodation  
17 issues for individuals who need help. Punishing Walmart, the  
18 one company that has given Ms. Spaeth an opportunity to work,  
19 would be just the opposite thing that needs to happen. They  
11:44 20 should be rewarded for their work with Ms. Spaeth, not punished.

21 So the EEOC has raised a number of points, and I just  
22 want to briefly touch on them, that we should have known as  
23 obvious that she needed a disability because of the statements  
24 that she was making.

11:44 25 Folks at Walmart, it wasn't obvious to them that they

1 knew she had a need for some sort of accommodation. I'm not  
2 going to revisit all the things I said earlier, but keep in mind  
3 that prior to her schedule change she was leaving work early,  
4 repeatedly. Repeatedly. There would be no reason for them to  
11:45 5 understand that because she's continuing conduct that she was  
6 engaged in when her schedule was noon to 4:00 that it must be  
7 something due to Down syndrome, especially when we heard Barbara  
8 Barnes testify that she wanted Marlo to be home at their regular  
9 dinner time.

11:45 10 You also heard there would be no basis for her to say  
11 that she couldn't catch a bus to get home at her later shift.  
12 There's a bus stop right outside of Walmart that she could take.

13 Walmart had absolutely no idea that that was a issue.  
14 And if it was so obvious, why didn't the EEOC go out and get an  
11:45 15 expert to try to talk to you about the issue? If it was so  
16 obvious that everyday folks would understand that, why did they  
17 feel compelled to have to get an expert witness to explain this  
18 groove about how people with Down syndrome need routine and when  
19 you interrupt that routine it sends them into some sort of  
11:46 20 tailspin that they can't cope with? If that's such an obvious  
21 principle, why did they need Dr. Smith?

22 And even Dr. Smith says that this whole idea, even in  
23 the medical field, is not widely known. So you expect some  
24 folks who were working at Walmart to understand that? If  
11:46 25 Ms. Stevenson had this information, why didn't she share it with

1 the folks at Walmart?

2 Could have provided an accommodation packet based on  
3 what Ms. Spaeth was saying? There's no basis for that. Nobody  
4 thought that her comments meant that she needed some help in  
11:46 5 order to do her job. She often would stay close to the end of  
6 her work schedule.

7 Calling Ms. Spaeth's sister's mother would have solved  
8 the problem. Well, unfortunately her mother was in a nursing  
9 home, and Ms. Spaeth's sister was fully aware of the schedule  
11:47 10 change. Why would that be an obligation of Walmart that they  
11 need to call the mother? The sister claimed to be the guardian.  
12 It's her obligation. That's a serious responsibility that you  
13 take on. If she thought that the schedule change was going to  
14 be problematic for her sister, she had an obligation, a legal  
11:47 15 obligation to do something about that.

16 The schedule change wasn't a big deal. I think  
17 Ms. Vance said they had other people who could work that hour  
18 and a half. But that's not how Walmart works. They don't just  
19 bring in somebody for an hour and a half. That would make no  
11:47 20 sense and that's not how they conduct their business. And they  
21 can't just simply give people their schedule preferences when  
22 there's no basis for that.

23 They had 300 people in the Manitowoc store. That  
24 would be very difficult for them to do. This availability form,  
11:48 25 you changed the availability form. But as we discussed, that

1 was beneficial for Ms. Spaeth.

2 And you heard Lee Spude say that this availability  
3 form issue, there are times where the paper doesn't match what's  
4 in the computer. By doing what they did for Ms. Spaeth, she was  
11:48 5 able to get hours and work.

6 And then the guidelines. Those guidelines are things  
7 that the Walmart managers follow, but they follow those things  
8 when they have a reason to believe that those guidelines are  
9 implicated. And the judge has instructed you that the issue is  
11:48 10 not guidelines, even assuming that Walmart didn't follow them.  
11 The issue is whether Walmart violated the ADA, and there's  
12 absolutely no evidence of that.

13 Raymond Donovan, for those who are interested in what  
14 that's all about.

11:48 15 He was a politician who ended up getting prosecuted  
16 for some sort of fraud allegation. And that's really not all  
17 that important. He ultimately was exonerated based on the  
18 allegations that he was facing. But he left some enduring words  
19 based on that experience. And after he was acquitted at his  
11:49 20 trial, this is the quote that lives on:

21 "Which office do I go to to get my reputation back?"

22 As I told you at the outset, I do represent Walmart.  
23 But more importantly, I'm here on behalf of the managers who  
24 have had their name dragged through the mud as if they somehow  
11:49 25 have some sort of bias or animus against Ms. Spaeth because of



1 her Down syndrome condition. They have been accused of  
2 violating the ADA, doing something that's unlawful.

3 Now, none of the questions really relate to those  
4 individual managers at Walmart who worked with Ms. Spaeth, and  
11:50 5 you can't check a box on the form, that's not part of the case,  
6 but your verdict rejecting each one of the EEOC's claims will be  
7 vindication for those managers, people like Julie Stern, Debbie  
8 Moss. You heard Debbie Moss. She appeared to be a sincere  
9 individual who was candid. Even Karen Becker who no longer  
11:50 10 works for Walmart, her name has been disparaged.

11 Your rejection of the EEOC each, and every one of  
12 their claims, will be vindication for them. And I ask that you  
13 do that; that you give them some measure of justice.

14 Thank you very much. Appreciate your time and  
11:50 15 attention.

16 THE COURT: Thank you, Mr. Harlan.

17 Ms. Carter?

18 REBUTTAL CLOSING ARGUMENT

19 MS. CARTER: Okay. Ladies and gentlemen, of the jury,  
11:51 20 let's take a minute and let the smokescreen clear the room. We  
21 were all at the same trial, right?

22 Mr. Harlan made a lot of claims about what certain  
23 witnesses said at this trial. But remember what the judge told  
24 you, trust your own memory. What the lawyers say is not  
11:52 25 evidence.

1 And unlike Mr. Harlan, I'm not going to tell you who  
2 to believe or who not to believe. You have the evidence, you  
3 heard the testimony, you are the factfinders here. The EEOC  
4 trusts your judgment.

11:52 5 And think about this. If Amy Jo Stevenson was all  
6 about money and just wanted to sue Walmart, remember when Marlo  
7 got fired? Amy Jo could have gone straight to the EEOC, but  
8 what did she do? She went to Walmart. She gave Walmart a  
9 chance to get it right. This wasn't about Amy Jo wanting to sue  
11:53 10 anyone, she was trying to get Marlo's job back. The only reason  
11 Amy Jo had to come to us is because Walmart never got back to  
12 her.

13 Remember that they couldn't reapply for 30 days. At  
14 the time that Amy Jo went to talk to Walmart it was within a  
11:53 15 week of Marlo getting fired. And Walmart told Amy Jo that they  
16 would take her request to their superiors.

17 Now they say, oh, there was more paperwork that she  
18 was supposed to submit. Oh, we didn't have medical information  
19 that we never requested. Consider the evidence that you've  
11:53 20 heard, make your own judgments.

21 Walmart wants you to look everywhere but at the actual  
22 issues in this case. Mr. Harlan just admitted that what he  
23 asked you to consider isn't even on the verdict form. It's not  
24 even in the jury instructions. This case isn't about Walmart's  
11:54 25 managers. We're not disparaging any of them. They are not

1 named as defendants in this case. The case is about Walmart.

2 Mr. Harlan also spoke a lot about Amy Jo Stevenson and  
3 when she became Marlo's guardian. None of that matters at all.  
4 You won't find it in the jury instructions. It's a nonissue.  
11:54 5 It's not relevant to the ADA and it's not one of the questions  
6 you have to consider.

7 This case is not about Amy Jo. Although I admit the  
8 photos that they chose were kind of interesting. This case is  
9 not about Barb. Poor Barb. She's scary to Marlo, apparently.  
11:55 10 That's what Walmart would like you to believe. Distractions.  
11 Just distractions.

12 Remember defendant's own policy. We showed it to you  
13 in various different forms. But remember that each policy said  
14 what? "Medical information is not necessary where the associate  
11:55 15 has a known or easily identifiable disability."

16 Everyone who came into this courtroom, what did they  
17 say? They knew Marlo had a disability from the first time they  
18 met her. Marlo Spaeth has a disability, a known and easily  
19 observable disability. Her Down syndrome substantially limits  
11:56 20 her ability to communicate, to understand, to concentrate, to  
21 think, and most importantly, to adapt.

22 And in particular, you have to think about it when you  
23 compare it to the average person in the population. That is in  
24 your jury instructions. We're not here trying to denigrate  
11:56 25 Marlo in any way. Marlo's amazing. But she needed help and

1 Walmart didn't give it to her.

2 Marlo Spaeth is a qualified individual because she  
3 could do her job at Walmart with a reasonable accommodation, a  
4 noon to 4:00 schedule, the schedule she had worked for 15 years.  
11:56 5 Her performance reviews show that she succeeded with that  
6 schedule.

7 Walmart's willful blindness does not excuse Walmart  
8 from its obligations under the ADA. Don't fall for their  
9 distractions. And as I mentioned, you'll notice that half of  
11:57 10 the topics that were covered in Walmart's closing are not in the  
11 jury instructions.

12 The dispute we have in this case is also not about  
13 what days of the week Marlo Spaeth could work. The testimony  
14 was about routine. And Dr. Smith told you that the routine can  
11:57 15 be -- can still be consistent even if it's different days of the  
16 week, because once Marlo got to Walmart she knew exactly what  
17 she was supposed to do and when she was supposed to do it and  
18 she was still able to follow her routine. Different days of the  
19 week don't matter. When she went to Walmart, she did the same  
11:58 20 thing at the same time and stuck to her schedule, before the  
21 schedule change.

22 Marlo Spaeth's early departures were not poor  
23 attendance. They were evidence that she needed an accommodation  
24 for her disability.

11:58 25 Her performance reviews for 15 years praised her

1 attendance. You'll notice that. You have the binders. They  
2 praised her performance. Everyone testified that she was good  
3 at her job. It was obvious. It was obvious she needed an  
4 accommodation. And it was a reasonable one, one that Walmart  
11:58 5 could have provided not even getting close to undue hardship,  
6 with no hardship, and it would have allowed Marlo Spaeth to  
7 comply with Walmart's attendance policy as she had for 15 years  
8 before they changed her schedule.

9 And when you look at the jury instructions, look  
11:59 10 closely under the section of reasonable accommodations. You'll  
11 see that schedule accommodations are one of the types listed.  
12 It's a standard accommodation. And just because Walmart chooses  
13 to disregard that obligation under the ADA, that's why we're  
14 here.

11:59 15 Walmart clearly denied Marlo Spaeth's request for  
16 accommodation, and she did request an accommodation. "Why can't  
17 I have my noon to 4:00 schedule back?" "Can I have my noon to  
18 4:00 schedule back?" What's that?

19 You saw Walmart's policies. No magic words are  
12:00 20 required. Anyone can ask for an accommodation. No written  
21 request is required. It can be verbal. A friend can ask for an  
22 accommodation. No medical information is required where it's  
23 obvious that you have a disability. But apparently the policies  
24 are just another smokescreen, Walmart has no intent to follow  
12:00 25 them. They obviously didn't follow them in Marlo's case.

1           The judge told you that we will have proven our case  
2 if you find by a preponderance of the evidence that Walmart  
3 fired Marlo Spaeth or did not reinstate Marlo Spaeth because of  
4 her disability. But pay attention when you're looking in the  
12:00 5 jury instructions, because it also says "or because of the need  
6 to reasonably accommodate her disability." We have absolutely  
7 met our burden in this case.

8           Walmart also told you that this case is about what  
9 Marlo wants versus needs. Did you catch that? That's true, but  
12:01 10 not in the way that Walmart means it. It is about wants versus  
11 needs, but it's not about Marlo's wants versus needs. When you  
12 think about it this case is really about what Walmart wanted  
13 versus what Marlo needed.

14           Walmart managed to meet the store's staffing needs for  
12:01 15 the 15 years that Marlo worked there, before the schedule  
16 change. Walmart didn't need Marlo Spaeth to work 4 to 5:30,  
17 Walmart just wanted her to. That's not the way Walmart likes to  
18 do things. That's a want, that's not a need.

19           It was a 24-hour store. Remember that? 24 hours.  
12:02 20 Seven days a week. They had to have people working there around  
21 the clock. Every associate didn't have to work peak times. It  
22 was a want. Walmart just wanted Marlo to work past 4:00.

23           So, yes, this case is about what Walmart wanted so  
24 much that it ignored the promises of the ADA. What Walmart  
12:02 25 wanted so much that it ignored what Marlo Spaeth actually

1 needed, reasonable accommodation, what Marlo was promised under  
2 the ADA.

3 Remember what I said on the first day of this trial.  
4 At its heart this case is about keeping promises and doing your  
12:02 5 part. Both the employee and the employer need to do their part  
6 when it comes to the ADA.

7 Marlo and her sister Amy Jo, they did their part; they  
8 asked Walmart to make an adjustment to Marlo's schedule. They  
9 did their part by reminding Walmart of Marlo's rights under the  
12:03 10 ADA after they fired her. They did their part by giving Walmart  
11 another chance to get it right. Walmart chose not to take that  
12 chance. Walmart had obligations under the ADA that it  
13 completely ignored when it came to Marlo Spaeth and it purposely  
14 turned a blind eye to.

12:03 15 Remember Karen Becker, Walmart's human resources  
16 coordinator, said she didn't agree -- I don't know if you caught  
17 this, but she said she didn't agree with anything Amy Jo  
18 Stevenson said at the post-termination meeting. Did that strike  
19 you as odd? Because remember that one of the things that Amy Jo  
12:04 20 Steve said at the post-termination meeting was that the ADA  
21 requires employers to provide reasonable accommodations to  
22 employees with disabilities.

23 Everyone agreed that Amy Jo raised the ADA at that  
24 meeting. But it doesn't matter whether Walmart agrees with the  
12:04 25 law, Walmart is required to follow the law.

1 Mr. Harlan also asked you, how much effort does it  
2 take? Think about that, the irony, huh? You heard Walmart has  
3 over a million employees. The Manitowoc store had 300  
4 associates that worked there. How can a 90-minute schedule  
12:05 5 change for one woman with a disability be a hardship to Walmart?

6 Marlo worked for Walmart for 15 years. She met and  
7 exceeded their expectations for 15 years. Look at her  
8 performance reviews. I thought it was very interesting that  
9 Walmart wants to disregard its own performance reviews of its  
12:05 10 employee. Just look at the reviews, you'll see, she was  
11 qualified. She folded the towels, she tidied the aisles, she  
12 did returns. She helped customers. Those were the essential  
13 functions of her job. And she fulfilled them before the  
14 schedule change, and after actually, the essential functions, it  
12:05 15 was just the attendance that she struggled with because she  
16 needed an accommodation.

17 Marlo was a good and dependable employee for Walmart.  
18 She could do that job with a noon to 4:00 schedule. She could  
19 comply with their attendance policy with a noon to 4:00  
12:06 20 schedule. This was her career and Walmart took it away. This  
21 was the center of Marlo's routine, Walmart took it away.

22 She was a proud and loyal Walmart employee. She  
23 didn't deserve to be treated that way. After Walmart fired her,  
24 Marlo did have to be placed on depression medication. She still  
12:06 25 takes that medicine every day. And Marlo herself told us that



1 she cried when Walmart fired her. Walmart would like to say it  
2 was 30 minutes. She cried when Walmart fired her. She really  
3 liked her job at Walmart. She wishes she could still work  
4 there. She told you. She misses helping people. She even  
12:07 5 misses doing returns. Nobody likes returns, but she misses  
6 doing returns. And she still gets sad when she sees Walmart  
7 trucks.

8 Barb, who lives with Marlo, she told us -- what did  
9 she tell you; do you remember? Marlo and Barb watch TV  
12:07 10 together. When Walmart commercials come on, Marlo can't look.  
11 She looks away. She covers her face with her hand.

12 Does that sound like someone who is over what happened  
13 to her six years ago? Barb said that the commercials remind her  
14 every time what Walmart did when Walmart fired her.

12:07 15 But it could have been so simple. Marlo obviously  
16 just needed an accommodation and Walmart just didn't want to  
17 give her one.

18 But the ADA gives Marlo federally protected rights,  
19 the federally protected right to a reasonable accommodation.

12:08 20 That's why we're here. Remember the standard in this case is  
21 the preponderance of the evidence, which just means more  
22 probably true than not true. Think about that. More probably  
23 true than not true.

24 The EEOC has certainly proven that its claims in this  
12:08 25 case are probably true. If Marlo's disability or her need for

1 accommodation tip the scales even the tiniest bit against  
2 Walmart, EEOC has proven its case on Marlo's behalf.

3 Look in the jury instructions. "More probably true  
4 than not true." Trust your judgment. Because the truth in this  
12:09 5 case is that Marlo's disability really was obvious to Walmart.  
6 The truth is that Marlo's need for an accommodation really was  
7 obvious to Walmart. How could it not be? It was obvious  
8 because she had worked with them for 15 years. They knew her  
9 and her limitations well.

12:09 10 You heard Marlo's managers testify that whenever they  
11 had to introduce a change she required extra support. And when  
12 she had basically a job coach, someone to be with her, to stay  
13 with her through it, to help her through it consistently, she  
14 was able to adapt.

12:09 15 But Walmart denied Marlo's request for an  
16 accommodation because Walmart wanted its employees to work the  
17 hours that the computer spat out. That's how Walmart does it,  
18 but that's not legal.

19 Remember, Marlo Spaeth's final rate of pay -- well,  
12:10 20 you'll see it if you take a closer look at her 2014 review, it  
21 was 12.50 an hour. Walmart, a company that's worth \$485  
22 billion, wants you to believe that changing Marlo Spaeth's  
23 schedule by 90 minutes, shifting her work schedule back to noon  
24 to 4:00 and paying her \$12 an hour to work noon to 4:00 is  
12:10 25 somehow an undue hardship to Walmart?

1           You're the factfinders. Think about it, though.

2 Walmart didn't need Marlo to work noon to 4:00, they just wanted  
3 her to work noon to 4:00.

4           You heard from manager Bonnie Popp that the order to  
12:11 5 deny the schedule change requests, where did it come from? Do  
6 you remember? It came from headquarters. And Bonnie Popp  
7 testified that she understood that the order to deny schedule  
8 accommodations also applied to individuals with disabilities.  
9 Do you remember when she said that? Trust your memory.

12:11 10           A company as sophisticated as Walmart knew exactly  
11 what it was doing. Walmart, a company with over a million  
12 employees, does not get to stick its head in the sand when it  
13 comes to the Americans With Disabilities Act. Walmart didn't do  
14 its part to fulfill the promises under the ADA, so here we are.

12:11 15           So when you go to fill out that verdict form, we ask  
16 you to enter a verdict in favor of the EEOC and Marlo Spaeth on  
17 all claims.

18           We ask you to find that Marlo Spaeth is a qualified  
19 individual with a disability.

12:12 20           We ask you to find that Walmart was aware of Marlo's  
21 disability and her need for a schedule accommodation.

22           We ask you to find that Walmart broke the promises of  
23 the ADA by denying Marlo her right to a reasonable  
24 accommodation, and that such an accommodation would not have  
12:12 25 been an undue hardship for Walmart.

1 We ask you to find that Walmart broke the promises of  
2 the ADA by firing Marlo either because of her disability or  
3 because of the need to accommodate her disability.

4 We ask you to find that Walmart broke the promises of  
12:12 5 the ADA by refusing to give Marlo her job back through  
6 reinstatement, either because of her disability or because of  
7 the need to accommodate her disability.

8 And we ask you to decide on an amount of money that  
9 will fairly and reasonably compensate Marlo for her emotional  
12:13 10 pain and her mental anguish. We won't ask you for a specific  
11 number, we trust your judgment. You determine what amount is  
12 enough to make things right for Marlo.

13 We also ask you to determine an amount that's enough  
14 in punitive damages to send Walmart a message that this conduct  
12:13 15 will not be tolerated.

16 And all of us from the EEOC, we deeply appreciate your  
17 attention this week. We appreciate your time, we really do.

18 And as I mentioned at the start of this trial, it is  
19 our honor and our privilege to enforce the Americans With  
12:14 20 Disabilities Act. And very few people get the opportunity to  
21 make things right for someone. But ladies and gentlemen of the  
22 jury, you have that opportunity today. You can make things  
23 right for Marlo Spaeth.

24 So today we ask you to do your part. What Walmart did  
12:14 25 to Marlo Spaeth was not right and it was not legal. Now it's up

1 to you. Hold Walmart accountable. Tell Walmart that what it  
2 did to Marlo Spaeth is completely unacceptable. Keep the ADA's  
3 promises to Marlo Spaeth because, as I told you at the start of  
4 this case, a promise made truly should be a promise kept.

12:15 5 Thank you for your time.

6 THE COURT: Thank you, Ms. Carter.

7 CONCLUDING JURY INSTRUCTIONS

8 THE COURT: Now, members of the jury, this case is  
9 ready to be submitted to you for your serious deliberation. It  
10 is an important case. It is important to the plaintiff, the  
11 EEOC, and, of course, Marlo Spaeth, it's also important to  
12 Walmart. Consider the case fairly, honestly, impartially, and  
13 in the light of reason and common sense. Give each question in  
14 the verdict your careful and conscientious consideration. In  
12:15 15 answering each question, free your minds of all feelings of  
16 sympathy, bias, or prejudice. Let your verdict speak the truth,  
17 whatever the truth may be.

18 The verdict must represent the considered judgment of  
19 each juror. In order to return a verdict, it is necessary that  
12:16 20 each juror agree. In other words, your verdict must be  
21 unanimous.

22 It is your duty, as jurors, to consult with one  
23 another, and to deliberate with a view to reaching an agreement,  
24 if you can do so without violence to your individual judgment.  
12:16 25 You must decide the case for yourself, but only after an

1 impartial consideration of the evidence in the case with your  
2 fellow jurors.

3 In the course of your deliberations, do not hesitate  
4 to re-examine your own views and change your opinion if you are  
12:16 5 convinced it is erroneous. But do not surrender your honest  
6 conviction as to the weight or effect of evidence solely because  
7 of the opinion of your fellow jurors or for the mere purpose of  
8 returning a verdict.

9 Remember at all times that you are not partisans. You  
12:16 10 are judges -- judges of the facts. Your sole interest is to  
11 seek the truth from the evidence in the case.

12 I remind you that you may not bring into the jury room  
13 any research materials or additional information; this includes  
14 dictionaries, computers, electronic communication devices, or  
12:17 15 other reference materials. You may not communicate in any way  
16 with anyone other than jurors until you have reached your  
17 verdict.

18 There is no written transcript of the trial testimony  
19 available immediately for use during your deliberations, so rely  
12:17 20 primarily on your memory of the evidence and testimony  
21 introduced during the trial and your notes.

22 As we've discussed, a form of verdict has been  
23 prepared for your convenience.

24 Certain questions in the verdict are not to be  
12:17 25 answered -- or are to be answered only if you have answered a

1 preceding question in a certain manner. Therefore, read the  
2 introductory portion of each question very carefully before you  
3 answer it. Do not needlessly answer questions.

4           Upon returning to the jury room, you will select one  
12:17 5 of your members to act as your foreperson. The foreperson will  
6 preside over your deliberations and will be your spokesperson  
7 here in court.

8           You will take to the jury room the verdict form that  
9 has been prepared for you. And you must reach a unanimous  
12:18 10 verdict; that is, all eight of you must agree on the answer to  
11 each question. When you have reached unanimous agreement as to  
12 your verdict, your foreperson will write in the verdict the  
13 answers you have agreed upon and will date and sign the verdict,  
14 and then all of you will return with your verdict to the  
12:18 15 courtroom.

16           I do not anticipate that you will need to communicate  
17 with me. If you do, however, the only proper way is in writing,  
18 signed by the foreperson, or if he or she is unwilling to do so,  
19 by some other juror, and given to the bailiff.

12:18 20           To have a complete record of this trial, it is  
21 important that you not communicate with me except by a written  
22 note.

23           If you have questions, I will talk to the parties  
24 before I answer, so it may take some time. You should continue  
12:18 25 your deliberations while you wait for my answer. I will answer

1 any questions in writing or orally here in open court.

2 You will note then from the oath about to be taken by  
3 the bailiff that he, too, as well as all other persons, are  
4 forbidden to communicate in any way or manner with any member of  
12:19 5 the jury on any subject touching on the merits of the case.  
6 Bear in mind also that you should never reveal to any person how  
7 the jury stands, numerically or otherwise, until after you have  
8 reached a unanimous verdict.

9 So at this time then the clerk will administer the  
12:19 10 oath to the bailiff, the court security officer.

11 (Bailiff sworn.)

12 THE COURT: Okay. Then you can retire to the jury  
13 room. Hopefully your sandwiches are ready. We will give you  
14 extra copies of the instructions.

12:20 15 (Jury out for deliberations at 12:20 p.m.)

16 THE COURT: Okay. We are outside the presence of the  
17 jury. Anything to put on the record at this point?

18 MR. MULHAIRE: Not from plaintiff.

19 MS. CARTER: No.

12:20 20 THE COURT: We do need to decide which exhibits should  
21 go to the jury. Have you talked about that?

22 MS. VANCE: No, Your Honor.

23 THE COURT: Okay. Well, do that. And let the clerk  
24 know if there's any dispute. And then we'll clear those up.

12:20 25 But let's see if we can get those to the jury. And then make



1 sure you let the clerk know a number where you can be reached  
2 and where we can get hold of you and perhaps get you back here  
3 within 10 minutes or so if need be.

4 My hunch is their lunch has probably arrived, so you  
12:21 5 should be safe in going to lunch or something like that.

6 And, finally, I want to thank the parties, thank you  
7 for your cooperative work in getting this case to a jury  
8 promptly and quickly and the assistance you've given the Court  
9 in trying to resolve difficult issues. It's always better to  
12:21 10 say thank you ahead of time, we don't know the result. But I  
11 think the case was well tried and hopefully the jury will be  
12 able to reach a verdict and we can go on.

13 MS. CARTER: Thank you, Your Honor.

14 MR. BULIOX: Thank you, Judge.

12:21 15 MR. BURNETT: Thank you.

16 MR. HARLAN: Thank you.

17 THE COURT: Okay. We're in recess then.

18 (Trial adjourned for jury deliberations at 12:21 p.m.,  
19 until 12:32 p.m.)

12:32 20 THE COURT: Okay. We're outside the presence of the  
21 jury and I understand there's some questions about exhibits.

22 Go ahead, be seated.

23 MR. MULAIRE: Yes, Your Honor.

24 So we conferred with defendant and we don't agree  
12:32 25 which exhibits should go back to the jury. The EEOC's view is

1 that the items that are in evidence, which we referred to in our  
2 closing and which we believe the jury should be able to examine  
3 freely, should go back to the jury with the exception of  
4 Exhibits 43 through 46 which are matters that relate solely to  
12:32 5 injunctive relief and so were only moved into evidence with the  
6 intention that the Court would have access to them later. We  
7 understand the defendant's position is that nothing should go  
8 back to the jury unless the jury specifically asks for it, which  
9 we disagree with.

12:33 10 THE COURT: Okay. Defense?

11 MR. BURNETT: Yes, Your Honor, that's our position,  
12 for a couple of reasons.

13 Number one, there's a lot of exhibits. And sending  
14 all of the exhibits back to the jury tends to prolong the  
12:33 15 deliberation and distracts rather than focuses. If the jury  
16 wants a specific exhibit they can ask for it by item, name, or  
17 by number and that has worked well, at least in state court  
18 practice here, for a number of years.

19 Otherwise the alternative is to go through these  
12:33 20 exhibits number by number between the parties and decide, while  
21 the jury is deliberating. Then what happens is you get a  
22 shipment of exhibits in the middle of a deliberation that can  
23 change the dynamic.

24 THE COURT: Well, you know, are there that many  
12:34 25 exhibits? How many were introduced? I know I have huge

1 binders, but what was introduced?

2 MR. HARLAN: I think it was a significant number.

3 MR. BURNETT: We haven't counted them but --

4 MR. MULAIRE: I don't have an exact count. But I will  
12:34 5 point out that the defendant did identify this much larger  
6 number of pages that they wanted into evidence. We entered into  
7 a stipulation at their request that they could all be moved into  
8 evidence. So then at the end of the trial for them to say  
9 they're too voluminous and, therefore, the jury can't see any of  
12:34 10 them does not strike me as reasonable.

11 THE COURT: I typically, especially where the parties  
12 have emphasized exhibits, and the review of exhibits was kind of  
13 cursory on the monitor, I let them have the exhibits typically  
14 and it avoids questions or they get them, they can look at what  
12:35 15 they want, and the case comes back.

16 So my inclination is to give them exhibits. I mean,  
17 it seems to me almost all of them in the EEOC binder were -- you  
18 know, both parties used them. They seemed to be pretty much  
19 joint exhibits. I don't know what else. Certainly I suppose the  
12:35 20 time records and the other one.

21 But, I mean, pull out the ones that were key and send  
22 them all in at once. I don't think we want to send them in  
23 piecemeal, but just send those in. And they all don't have to  
24 go in, especially if they're voluminous exhibits and just a  
12:35 25 little bit was used like medical records, we're not going to

1 send all the medical records all in. Especially when just one  
2 small comment was introduced in during the course of the trial  
3 on medical records.

4 But, you know, the job evaluations, the availability  
12:36 5 forms, the attendance records, the policies and the  
6 investigation emails and counseling emails, those are the types  
7 of things that I think would typically go in. And to the extent  
8 they were admitted, those things can go in. Okay?

9 MR. MULAIRE: Thank you, Your Honor.

12:36 10 MR. HARLAN: What about, Your Honor, the financials?

11 THE COURT: Financials don't have to go in.

12 MR. HARLAN: Thank you.

13 MS. VANCE: It's the one page, Your Honor, that was  
14 referred to in closing.

12:36 15 THE COURT: It was referred to in closing, I think  
16 that's enough. I mean, it doesn't even -- you said it was  
17 millions which would make it billions, but it's not even clear  
18 from the exhibit what we're talking about.

19 MS. VANCE: Your Honor, that's why that page would  
12:36 20 help.

21 THE COURT: Does the page explain?

22 MS. VANCE: Yes, that's the first thing it says at the  
23 top left, reported in millions. Yes, it's reported in millions.  
24 There wouldn't be enough room on the page if there had to be six  
12:37 25 zeros following every number.

1 THE COURT: Yes.

2 MR. HARLAN: We would object to that, Your Honor. I  
3 think the spirit was that this was just going to be shown and it  
4 wasn't going to be a focus. Obviously it got into the EEOC's  
12:37 5 arguments and they obviously know the size and scope and now  
6 they even know the revenues. I don't think it would be an  
7 appropriate --

8 THE COURT: I think it's fine the way it is so let's  
9 leave that exhibit out. I mean, I don't think that's one the  
12:37 10 jury really needs to review and consider and evaluate. I think  
11 they understand Walmart is a very large business, they've heard  
12 the numbers, we can go from there. Okay?

13 MR. MULAIRE: Okay.

14 THE COURT: All right. We're in recess then.

12:38 15 (Recess taken for continued jury deliberations at  
16 12:37 p.m., until 3:22 p.m.)

17 THE COURT: I think we're in the process of bringing  
18 the jury in.

19 We had a question.

03:22 20 Go ahead, be seated. When the jury comes in we'll get  
21 up.

22 The question we had was: "Is there a cap on the  
23 amount that we can award for punitive damages?"

24 But they told us -- it was not signed, we sent it back  
03:22 25 for a signature, and then we were told they had a verdict. So

1 we'll bring in the verdict.

2 MS. VANCE: I'm sorry, Your Honor, I'm unclear, was  
3 there an answer to the jury's question?

4 THE COURT: No. I brought you here before formulating  
03:22 5 an answer, and they reached a verdict before they got any  
6 answer. They advised us they had a verdict.

7 MS. CARTER: Okay.

8 THE COURT: So we'll make that question part of the  
9 record, but they apparently decided without it.

03:23 10 MS. CARTER: Thank you, Your Honor.

11 THE COURT: And they're on their way, Scott?

12 (Brief pause.)

13 (Jury in at 3:24 p.m.)

14 THE COURT: Okay, ladies and gentlemen of the jury.  
03:24 15 Have you reached a verdict?

16 THE FOREPERSON: Yes, Your Honor.

17 THE COURT: And are you the foreperson?

18 THE FOREPERSON: Yes, Your Honor.

19 THE COURT: Would you hand the verdict to the court  
03:24 20 security officer, please. You can be seated.

21 (Verdict tendered to the Court.)

22 **VERDICT**

23 THE COURT: Okay. The verdict reads as follows:

24 "We, the jury, for our Special Verdict, answer the  
03:25 25 questions submitted to us as follows:

1 "1. During the time of her employment with Walmart,  
2 was Marlo Spaeth a qualified person with a disability?

3 "ANSWER: Yes.

4 "Question 2. Was Walmart aware that Marlo Spaeth  
03:25 5 needed an accommodation due to her disability?

6 "ANSWER: Yes.

7 "Question 3. Did Walmart fail to provide Marlo Spaeth  
8 with a reasonable accommodation?

9 "ANSWER: Yes.

03:25 10 "Question 4. Would providing Marlo Spaeth an  
11 accommodation have posed an undue hardship to Walmart's  
12 business?

13 "ANSWER: No.

14 "Question 5. Did Walmart violate the Americans With  
03:25 15 Disabilities Act by terminating Marlo Spaeth because of her  
16 disability?

17 "ANSWER: Yes.

18 "Question 6. Did Walmart violate the Americans With  
19 Disabilities Act by failing to reinstate Marlo Spaeth because of  
03:25 20 her disability?

21 "ANSWER yes.

22 "7. What sum of money will fairly and reasonably  
23 compensate Marlo Spaeth for her emotional pain and mental  
24 anguish?

03:26 25 "ANSWER: \$150,000.

1 "Question 8. What amount, if any, do you award as  
2 punitive damages?

3 "ANSWER: \$125 million."

4 Ladies and gentlemen of the jury, is this your  
03:26 5 verdict?

6 JURY IN UNISON: Yes.

7 THE COURT: Either party wish to have the jury polled?

8 MR. HARLAN: Yes, Your Honor.

9 THE COURT: What that means is I have to ask you to  
03:26 10 tell me out loud and for the record if this is your verdict say  
11 yes, this is my verdict, and if it's not tell me no.

12 We'll start with Juror Ms. Roberts.

13 JUROR ROBERTS: Yes.

14 JUROR SCHULTZ: Yes.

03:26 15 JUROR MILLER: Yes.

16 JUROR VANDERBLOOMEN: Yes.

17 JUROR WENNINGER: Yes.

18 JUROR STEIMEL: Yes.

19 JUROR TESCHKE: Yes.

03:26 20 JUROR ALVARADO: Yes.

21 THE COURT: Satisfactory?

22 MR. HARLAN: Yes.

23 THE COURT: Okay. Ladies and gentlemen of the jury,  
24 your service in the case is complete. You don't have to answer  
03:26 25 any questions, but you're no longer required to remain silent.



1 You can talk about the case all you want, if you want. But you  
2 don't have to. It's up to you.

3 I want to add my thanks to the thanks extended to you  
4 already by the parties for your attention to the case, your  
03:27 5 careful deliberation and your verdict, the work you've done on  
6 the case. So thank you very much and you're free to go.

7 (Jury out at 3:27 p.m.)

8 THE COURT: Okay. Go ahead and be seated.

9 You're aware of motions dates, follow the rules. I'll  
03:27 10 file the verdict with the clerk. Any comment or anything  
11 further to do today?

12 MR. MULAIRE: One question that I think we meant to  
13 ask before the jury came back in was whether we are free -- to  
14 the extent we run into them in the parking lot or otherwise have  
03:28 15 a chance to speak with them, does Your Honor have any guidance  
16 about whether we can speak with the jurors? We find it useful  
17 just as lawyers who do trials only so often, but we wanted to  
18 ask can we speak to the jury about the case.

19 THE COURT: Defense, same thing or --

03:28 20 MR. HARLAN: I don't know what your normal practice  
21 is, Your Honor.

22 THE COURT: The general rule is we discourage it, but  
23 there's not a hard and fast rule. You know, the last thing I  
24 want to see is any -- you know, I'm sure you would not be at all  
03:29 25 critical. But I would, at least for a couple days, leave the

1 jury alone.

2 MR. MULAIRES: That's why we ask.

3 MS. CARTER: Yes.

4 MR. MULAIRES: I guess one other question is, I think  
03:29 5 our proposal would be to address equitable relief on the papers.  
6 And I don't think we see a need to have a further evidentiary  
7 hearing, but we wanted to find out should we do that on the same  
8 schedule as other post-trial motions? I don't think the local  
9 rule has a specific briefing schedule for that, but --

03:29 10 THE COURT: Yeah, I think that makes sense. If I need  
11 to have an evidentiary hearing, if defendants believe there are  
12 factual disputes that the court needs to decide and hear, I can,  
13 after looking at the paper, the evidentiary materials you submit  
14 on paper, make that determination.

03:30 15 MR. MULAIRES: And then, I'm trying to remember now, to  
16 the extent I think the -- is the court's practice to enter  
17 judgment on the verdict right away or to wait until post-trial  
18 motions are concluded first?

19 THE COURT: I think the statute pretty much indicates  
03:30 20 we enter judgment on the verdict, but we wait for motions after  
21 verdict then to -- for remittitur or for things of that nature.

22 MR. BURNETT: I think we should have an oral motion at  
23 the present time to reduce the punitive damage award to the  
24 statutory maximum of \$300,000.

03:30 25 THE COURT: Is that a statutory maximum for punitives?

1 MR. BURNETT: I thought so.

2 MR. HARLAN: Compensatory and punitives.

3 THE COURT: And compensatory?

4 MR. MULAIRE: Yeah, the total of compensatory and  
03:30 5 punitives can't exceed 300,000. I mean, it should be reduced to  
6 that for purposes of the judgment. The verdict is what it is.

7 THE COURT: Right. Yeah. Well, then I'll direct  
8 entry of the judgment in the amount of \$300,000 in favor of EEOC  
9 and against Walmart.

03:31 10 MR. MULAIRE: Thank you. And I think -- and the  
11 reduction -- we would propose that the reduction come entirely  
12 out of the punitives, meaning of the 300,000, 150 should be  
13 compensatory, 150 should be punitive.

14 THE COURT: Okay. Any objection to that?

03:31 15 MR. BURNETT: No, reserving our rights on motions  
16 after to challenge that aspect of the award.

17 THE COURT: Right. Okay. Anything further today?

18 MR. MULAIRE: Nothing from the plaintiff.

19 THE COURT: Okay, very well. This matter is concluded  
03:31 20 then. Thank you.

21 MS. CARTER: Thank you, Your Honor.

22 (Proceedings concluded at 3:31 p.m.)

23 \* \* \*

24

25

C E R T I F I C A T E

I, JOHN T. SCHINDHELM, RMR, CRR, Official Court  
Reporter for the United States District Court for the Eastern  
District of Wisconsin, do hereby certify that the foregoing  
pages are a true and accurate transcription of my original  
machine shorthand notes taken in the aforementioned matter to  
the best of my skill and ability.

Signed and Certified August 4, 2021.

/s/John T. Schindhelm

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